

No. 15982

United States
Court of Appeals
for the Ninth Circuit

LESLY COHEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

JUN 20 1958

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	12
Appearances	1
Certificate of Clerk.....	264
Decision	249
Docket Entries	262
Findings of Fact and Opinion.....	206
Notice of Filing Petition for Review.....	256
Petition	3
Exhibit A—Notice of Deficiency.....	7
Petition for Review.....	250
Stipulation of Facts.....	257
Transcript of Proceedings.....	17
Opening Statement on Behalf of Petitioner	18
Opening Statement on Behalf of Respondent	28
Witnesses, Petitioner's:	
Calegari, Adolph	
direct	34, 135
cross	62

Witnesses, Petitioner's—(Continued):

Cohen, Lesly

direct	81, 154
cross	152, 158
redirect	178
recross	184

Evje, Arnold W.

direct	66
voir dire.....	72
cross	80

Witnesses, Respondent's:

Adrian, Glenn H.

direct	188
cross	196
redirect	203

Doherty, William J.

direct	176
--------------	-----

Lund, Robert K.

direct	173
cross	174

APPEARANCES

CLYDE C. SHERWOOD,
JOHN V. LEWIS,
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For the Petitioner.

CHARLES K. RICE,
Asst. U. S. Attorney General;

LEE A. JACKSON,
Attorney, Dept. of Justice,
Washington 25, D. C.,
For the Respondent.

The Tax Court of the United States

Docket No. 46719

LESLY COHEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau Symbols IRA:90-D:HM) dated November 25, 1952, and, as the basis for his proceeding, alleges as follows:

1. The petitioner is an individual, residing at 471-12th Avenue, San Francisco, California. The returns for the period here involved were filed with the Collector for the First Collection District of California.

2. The Notice of Deficiency (copy of which is attached hereto and marked Exhibit "A"), was mailed to the petitioner on November 25, 1952.

3. The taxes in controversy are income tax deficiencies and penalties for the taxable years ended, respectively, December 31st, 1948, 1949 and 1950 in the following amounts:

Year	Deficiency	Penalty
1948 Income tax	\$ 538,911.40	\$269,455.70
1949 Income tax	426,038.44	213,019.22
1950 Income tax	228,561.34	114,280.67
	\$1,193,511.18	\$596,755.59
Total		

The entire amounts set forth above are in dispute.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

Increases in business income for the taxable years ended, respectively, December 31, 1948, 1949 and 1950 as hereinafter set forth:

Year	Increase in Business Income
1948	\$693,189.62
1949	\$542,478.73
1950	\$326,095.00

The facts upon which petitioner relies as the basis of this proceeding are as follows:

I.

For all taxable years involved, petitioner kept his books and filed his income tax returns upon the calendar year and cash bases. Within the time allowed by law therefor, petitioner filed his income tax returns for each of the taxable years involved with the Collector of Internal Revenue for the First Collection District of California.

II.

During the taxable years involved, petitioner owned and operated, as sole proprietor, a business establishment known as the Kingston Club, which said Kingston Club was located at 111 Ellis Street,

San Francisco, California. Petitioner caused true and complete books of account to be maintained in respect of all of the transactions of the said Kingston Club, which books were kept by a reputable, duly licensed public accountant, with offices at San Francisco, California. Said books correctly reflected all income from the operations of the said Kingston Club for each of the taxable years in question.

III.

During the taxable years involved, petitioner caused true and complete books of account to be maintained of all transactions other than the operation of the said Kingston Club which said books of account were kept by a reputable firm of Certified Public Accountants with business offices at San Francisco. Said books of account correctly reflected all income from the transactions other than the operation of the said Kingston Club for each of the taxable years involved.

IV.

The said firm of Certified Public Accountants prepared petitioner's income returns for each of the taxable years involved, based upon the books of account aforesaid, maintained, respectively, for the Kingston Club and the transactions other than the Kingston Club. Said income tax returns correctly reflected petitioner's gross and net incomes for each of the taxable years involved.

V.

Respondent arbitrarily disregarded petitioner's books of account and recomputed petitioner's tax-

able income for each of the taxable years in question by wholly arbitrary methods and without disclosing in his said Notice of Deficiency the basis of his computations. Respondent's determination of petitioner's income and tax liability for each of the years involved as set forth in the said Notice of Deficiency is without any basis in fact, and wholly arbitrary.

VI.

All of petitioner's income tax returns for the years in controversy were prepared and filed with all due care and in the bona fide belief that they reflected petitioner's true taxable income and tax liability for each of the years in question. At no time did petitioner have any intent to understate his income or evade taxes. The assertion by the respondent of a fifty per cent fraud penalty with respect to the taxable years involved as set forth in the said Notice of Deficiency is without any basis in fact and wholly arbitrary.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no income tax deficiency and no penalty due for any of the taxable years involved.

/s/ JOHN V. LEWIS,

/s/ CLYDE C. SHERWOOD,

Attorneys for Petitioner.

Duly verified.

EXHIBIT A

Copy

U. S. Treasury Department
Office of Internal Revenue Agent in Charge
74 New Montgomery Street
San Francisco 5, California

Nov. 25, 1952.

San Francisco
IRA :90-D :HM

Mr. Lesly Cohen,
471-12th Avenue,
San Francisco, California.

Dear Mr. Cohen:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1948, to December 31, 1950, inclusive, discloses a deficiency of \$1,193,511.18 plus penalty of \$596,755.59 as shown in the statement attached. Assessment of such deficiency or deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not

exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Very truly yours,

JOHN S. GRAHAM,
Acting Commissioner;

By /s/ HENRY J. BRU,
Internal Revenue Agent in
Charge.

Enclosures:
Statement
Form 1276
HM

San Francisco
IRA :90-D:HM

Statement

Mr. Lesly Cohen
471 Twelfth Avenue
San Francisco, California

Tax Liability for the Taxable Years Ended December 31,
1948, to December 31, 1950, Inclusive

Deficiency and Penalty Assessed October 28, 1952

Telegraphic Special No. 13 List First California District

Year		Deficiency	Penalty
1948	Income tax	\$ 538,911.40	\$269,455.70
1949	Income tax	426,038.44	213,019.22
1950	Income tax	228,561.34	114,280.67
	Total	<u>\$1,193,511.18</u>	<u>\$596,755.59</u>

The determination of your tax liability and penalty is made on the basis of information on file in this office.

The 50 per cent penalty shown herein has been asserted under the provisions of section 293(b) of the Internal Revenue Code.

Adjustments to Net Income
Year: 1948

Net income as disclosed by return.....		\$ 24,540.94
Unallowable deductions and additional income:		
(a) Interest	\$ 159.12	
(b) Business income	693,189.62	693,348.74
		<hr/>
Net income as adjusted		\$717,889.68

Explanation of Adjustments

(a) Income is increased by \$159.12 representing interest received on a refund of Federal income tax, which was not included in income as reported.

(b) Available information discloses that income in the amount of \$693,189.62 was not included in the net income as reported.

Computation of Alternative Tax
Year: 1948

Income subject to tentative tax (separate return)		\$717,289.68
Less: Excess of net long-term capital gain over net short-term capital loss (separate return)		216.15
		<hr/>
Balance subject to tentative tax.....		\$717,073.53
Tentative tax		\$627,356.92
Tax reduction:		
Over \$100,000.00	\$ 12,020.00	
9.75% on \$527,356.92.....	51,417.30	
		<hr/>
Total tax reduction		63,437.30

Combined partial normal tax and surtax	\$563,919.62
Add: 50% of excess of net long-term capital gain over net short-term capital loss (separate return).....	108.08
	<hr/>
Alternative tax	\$564,027.70

Computation of Income Tax
Year: 1948

Net income	\$717,889.68	
Less one exemption at \$600.00.....	600.00	
	<hr/>	
Normal tax and surtax net income....	\$717,289.68	
Tentative tax		\$627,553.61
Less: Over \$100,000.00	\$ 12,020.00	
9.75% on \$527,553.61	51,436.48	63,456.48
	<hr/>	<hr/>
Balance		\$564,097.13
Total alternative tax		\$564,027.70
Limited to 77%		\$552,775.05
Correct income tax liability.....		\$552,775.05
Income tax disclosed by return, Original, Account No. 31930086, First California District	\$ 8,357.98	
Additional, Account No. 516528, May 24, 1951, List.....	5,505.67	\$ 13,863.65
	<hr/>	<hr/>
Deficiency in income tax.....		\$538,911.40
50% penalty		\$269,455.70

Adjustments to Net Income
Year: 1949

Net income as disclosed by return.....	\$ 35,740.69
Unallowable deductions and addi- tional income:	
(a) Business income	\$542,478.73
	<hr/>
Net income as adjusted	\$578,219.42

Explanation of Adjustments

(a) Available information discloses that income in the amount of \$542,478.73 was not included in the net income as reported.

Computation of Income Tax

Year: 1949

Net income	\$578,219.42	
Less: One exemption at \$600.00.....	600.00	
	<hr/>	
Normal tax and surtax net income....	\$577,619.42	
Tentative tax		\$500,453.67
Less: Over \$100,000.00	\$ 12,020.00	
9.75% on \$400,453.67	39,044.23	51,064.23
	<hr/>	<hr/>
Balance		\$449,389.44
Total income tax—twice the above balance—Limitation 77%		\$445,228.95
Correct income tax liability		\$445,228.95
Income tax disclosed by return, Original, Account No. 319307, June, 1950, List First California District	\$ 14,501.28	
Additional, Account No. 516529, May 24, 1951, List	4,689.23	\$ 19,190.51
	<hr/>	<hr/>
Deficiency in income tax.....		\$426,038.44
50% penalty		\$213,019.22

Adjustments to Net Income

Year: 1950

Net income as disclosed by return (loss).....	(\$ 24,845.14)
Unallowable deductions and additional income:	
(a) Business income	\$326,095.00
	<hr/>
Net income as adjusted	\$301,249.86

Explanation of Adjustments

(a) Available information discloses that income in the amount of \$326,095.00 was not included in income as reported.

Computation of Income Tax

Year: 1950

Net income	\$301,249.86	
Less: One exemption at \$600.00.....	600.00	
	<hr/>	
Normal tax and surtax net income.....	\$300,649.86	
Tentative tax		\$248,411.37
Less: Over \$100,000.00	9,016.00	
7.3% on \$148,411.37	10,834.03	19,850.03
	<hr/>	<hr/>
Correct income tax liability.....		\$228,561.34
Income tax disclosed by return, Original, Account No. 3125839, First California District		0.00
		<hr/>
Deficiency in income tax.....		\$228,561.34
50% penalty		\$114,280.67

Received and filed February 2, 1953, T.C.U.S.

Served February 3, 1953.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed

by the above-named petitioner, admits, denies, and alleges as follows:

1, 2. Admits the material allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income tax deficiencies and penalties for the taxable years 1948, 1949, and 1950; denies the remaining material allegations contained in paragraph 3 of the petition.

4. Denies that the Commissioner erred in the manner and form as alleged in paragraph 4 of the petition.

5. Admits that for all taxable years involved petitioner filed his income tax return on the calendar year and cash basis, and that said income tax returns were filed for each of the taxable years with the Collector of Internal Revenue for the First District of California; denies the remaining material allegations contained in paragraph 5.I of the petition.

5.II. Admits that during the taxable years involved petitioner owned and operated as sole proprietor a business establishment known as the Kingston Club, which said Kingston Club was located at 111 Ellis Street, San Francisco, California; denies the remaining material allegations contained in paragraph 5.II of the petition.

5.III. Denies the material allegations contained in paragraph 5.III of the petition.

5.IV. Admits that a firm of certified public accountants prepared petitioner's income tax returns for each of the taxable years involved; denies the remaining material allegations contained in paragraph 5.IV of the petition.

5.V, VI. Denies the material allegations contained in paragraphs 5.V and 5.VI of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore admitted, qualified, or denied.

7. Further answering the petition herein, the respondent alleges as follows:

(a) That the petitioner, during the years 1948 to 1950, inclusive, and prior thereto, was engaged in various business activities, inter alia, as a book-maker and betting commissioner in the City of San Francisco, California, and elsewhere.

(b) That for the taxable year 1948 petitioner derived a taxable net income of not less than \$717,889.68, as shown by his adjusted bank accounts, of which amount he omitted from the return as filed by him for said year the amount of \$693,189.62, as set forth in the notice of deficiency attached to the petition.

(c) That for the taxable year 1949 petitioner derived a taxable net income of not less than \$578,219.42, as shown by his adjusted bank accounts, of which amount he omitted from the return as filed

by him for said year the amount of \$542,478.73, as set forth in the notice of deficiency attached to the petition.

(d) That for the taxable year 1950 petitioner derived a taxable net income of not less than \$326,095.00, as shown by his adjusted bank accounts, of which amount he omitted from the return as filed by him for said year the amount of \$326,095.00, as set forth in the notice of deficiency attached to the petition.

(e) That petitioner, on the individual income tax returns filed by him for the years 1948 to 1950, inclusive, reported an income tax liability as follows:

1948	\$ 8,357.98
1949	14,501.28
1950	None

when he then and there well knew that his true liability for income tax for 1948 was \$552,775.05; for 1949 it was \$445,228.95, and for 1950 it was \$228,561.34.

(f) That notwithstanding that for the years 1948 to 1950, inclusive, petitioner well knew that he had derived an income and incurred a tax liability as set forth in the preceding paragraphs and in the notice of deficiency from which the appeal is taken, nevertheless, with fraudulent intent, and for the purpose of concealing his true income and defrauding and deceiving the respondent and the United States, petitioner wilfully and knowingly reported

an income for each of the taxable years in an amount substantially less than his true income.

(g) That by reason of the premises, the return as filed by petitioner for each of the taxable years 1948, 1949, and 1950, as aforesaid, is a false and fraudulent return filed with intent to evade tax, and the deficiency in income tax for each of the years 1948 to 1950, inclusive, is due to fraud with intent to evade tax.

Wherefore, it is prayed that the petitioner's appeal be denied, and, further, that the Court redetermine and hold (1) that the deficiencies in income tax and penalties for the years and in the amounts set forth in the notice of deficiency be in all respects approved; (2) that the return as filed by petitioner for each of the taxable years 1948 to 1950, inclusive, is a false and fraudulent return filed with intent to evade tax; (3) that the deficiency in income tax for each of the taxable years 1948, 1949, and 1950 is due, in whole or in part, to fraud with intent to evade tax.

/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of
Internal Revenue.

Filed March 31, 1953, T.C.U.S.

The Tax Court of the United States

Docket No. 46719

In the Matter of:

LESLY COHEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF PROCEEDINGS
San Francisco, California, March 28, 1956.
(Met pursuant to call of the calendar.)

Before: Honorable Morton P. Fisher, Judge.

Appearances:

JOHN V. LEWIS and
CLYDE C. SHERWOOD

703 Market Street, San Francisco, Cali-
fornia, Appearing for the Petitioner.

CHARLES W. NYQUIST,
HONORABLE JOHN POTTS BARNES,
Chief Counsel, Bureau of Internal Reve-
nue, Appearing for the Respondent.

The Clerk: Docket 46719, Lesly Cohen.

Will counsel please state your appearances for
the record.

Mr. Sherwood: Clyde C. Sherwood for the Petitioner.

Mr. Lewis: John V. Lewis for the Petitioner.

Mr. Nyquist: Charles W. Nyquist for the Respondent.

The Court: You may proceed.

Opening Statement on Behalf of Petitioner

Mr. Sherwood: If the Court please, in this case the Commissioner of Internal Revenue has levied a jeopardy assessment, and has determined a deficiency based upon a claim that Petitioner failed to report all of his income for the calendar years 1948, 1949 and 1950. I believe that the time which this hearing will require will be materially reduced and the issues clarified if I make a rather complete opening statement concerning what the Petitioner's proof will consist of.

The Petitioner, Lesly Cohen, was born in San Francisco and educated in its schools. He went to work on the old San Francisco Bulletin as a copy boy and eventually became a sports writer and member of the sports staff. In this capacity he became recognized authority on sports events. The Bulletin was eventually sold to the San Francisco Call and is now published as the Call-Bulletin. Petitioner became a free-lance writer on sports subjects and editor of two boxing magazines. He also handled a wire for the Associated Press and did [2*] publicity work for boxing and other sports events.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

During World War II he was inducted into the United States Army and upon his discharge returned to his native San Francisco.

In San Francisco a Mr. Coplin owned and operated the Kingston Club. This club was a legal card room, and its operation was not in violation of the laws of the State of California or the ordinances of the City and County of San Francisco. However, Mr. Coplin conducted another business on the same premises which was contrary to both State and local law. This latter business was that of a betting commissioner, and under Coplin was largely confined to wagering on horse races. There was a great post-war interest in all sorts of sports events, and Mr. Coplin desired to expand the business to embrace all sorts of athletic events in addition to horse racing. Because of Petitioner's expert knowledge of sports events, Mr. Coplin invited him to come into the business as a limited partner.

About the end of 1947 Mr. Coplin died, and Petitioner arranged with his estate to take over the operation of the business. Thereafter, until the effective date of the Federal Gambling Stamp Tax Law, Petitioner operated the card room and the betting commissioner business as sole proprietor. Petitioner filed income tax returns for the years in question and maintains that the income disclosed by these returns was and is correct. [3]

He is unmarried and lived in his mother's home with several of his brothers and sisters. His expenditures for living expenses and personal withdrawals during the period here involved were modest and

well within the income disclosed by his tax returns. His net worth at the beginning and end of each of the years here involved is consistent with his reported earnings. In short, none of the usual circumstances which tend to bolster the Commissioner's determination of unreported income are present in this case. Apparently the Respondent does not question Petitioner's return of income and expense from the card room at the Kingston Club.

The Kingston Club maintained, and we have present here in Court, complete and detailed records of its income and expense. These were taken off monthly by the accountant and appear upon summaries which will be introduced in evidence.

Petitioner was unable to maintain a similar set of records for his betting commissioner's business because the possession of such records would be incriminating if they fell into the hands of law-enforcement officers and would also be embarrassing to his customers. It therefore becomes necessary for us to go into the method by which the Petitioner conducted his business and arrived at his gross and net income from that business.

Petitioner was not engaged in gambling. His function as a betting commissioner was to bring together the parties [4] to a wager for a commission. Petitioner would quote prevailing odds on races and athletic events, and if a customer wished to make a wager, Petitioner would find others to cover the bet. Through connections with brokers in other cities and with other brokers in this immediate area, Petitioner would cover bets which he was unable to place

among his own customers. This is known as "laying off bets." Petitioner's normal commission was 5% of the total amount of the wager.

However, he never voluntarily carried any part of the wagers himself, and sometimes had to forego part or all of his commission in order to dispose of one side of a wager to another broker. In some instances the 5% commission was divided with the other broker, but in other instances it was necessary to give up the commission entirely in order to cover the risk.

Occasionally, Petitioner was unable, through miscalculation or other circumstances, to lay off a bet. Since these were usually the undesirable bets he was more apt to lose than win upon such occasions, and therefore would gladly forego his commission in order to cover the undesirable bet with someone else.

There were several other betting commissioners in the San Francisco Bay Area, and Petitioner had working arrangements with them whereby they traded wagers when necessary to balance the two sides of a transaction. Betting commissioners [5] in this area followed a universal practice of handling all transactions in cash. Petitioner normally collected losses in cash and paid winners in cash. Most of his business was handled by word-of-mouth, usually over the telephone, and cash settlements were made following the happening of an event.

Transactions with other brokers were usually settled at periodic intervals or when the amount reached a certain fixed sum in favor of one party or the other. Comparatively little money was actu-

ally posted with the Petitioner prior to the happening of the event, which determined the wager. Settlements with out-of-city brokers were generally made by check. Petitioner usually sent his own checks, although occasionally other brokers required Cashiers Checks.

Petitioner maintained a daily revolving fund of about \$3,000 in cash. Checks received were deposited in the bank or cashed depending upon the needs of the revolving fund and the amount of cash required to pay off local bettors at the time. The amount of the bank deposits and checks cashed does not reflect the gross volume of Petitioner's business or his gross income therefrom.

In order to expedite this hearing, we have entered into a stipulation at the request of the Respondent showing the Petitioner's bank deposits for the years in question and a large number of checks which Petitioner received from others and cashed. In this connection, we simply point out that the [6] stipulation does not purport to reflect the gross volume of business handled by Petitioner.

As stated before, Petitioner did not make the full 5% on all wagers. He also suffered occasional losses by being unable to collect from the losers. However, if you assume that he made a full 5% commission on all transactions and suffered no losses whatsoever, his reported income for the three years in question would have required him to handle a much greater volume of money than the amounts set forth in the stipulation.

The Respondent's deficiency letter purports to de-

termine that the total amount deposited in the bank and the total amount of the checks cashed constituted income. In our opinion as soon as the evidence discloses that the amounts set forth in the deficiency letter are in fact a portion of gross receipts, the presumption in favor of the Respondent's determination is dispelled. However, we expect to affirmatively prove that the income tax returns correctly reflect Petitioner's net income. We expect to do this in four ways:

First, the method of ascertaining gross and net income employed by Petitioner's accountant reflected Petitioner's taxable income. For several years prior to the time that he went to the Kingston Club, Petitioner had employed a certified public accountant to keep his books and prepare his income tax returns. This accountant, whose name is Mr. [7] Calegari, kept a set of books which covered a partnership between Petitioner and his brother and kept a record of Petitioner's investments outside of the Kingston Club. As far as we know, Respondent has raised no issue concerning any of the records kept or work performed by Mr. Calegari.

At the time Petitioner went with Mr. Coplin, Mr. Coplin had an accountant by the name of Murton. Mr. Murton went to the Kingston Club at least every month and took off the records of the income and disbursements of the card room. He also collected daily memorandum sheets upon which the Petitioner had noted daily cash expenditures. He also took the bank statements and canceled checks

and reconciled the bank statement with the check book stubs. Mr. Murton consistently kept the bank statements, checks and other memoranda either at his home or his office. They were not kept at the Kingston Club as were the books of account of the card room.

Mr. Murton arrived at Petitioner's gross income at the end of each year by subtracting the amount in the bank at the beginning of the year from the amount in the bank at the end of the year. He disregarded the \$3,000 revolving fund on the theory that it remained approximately the same throughout the period. He added to the net increase or decrease in the bank balance all of the expenses of the business and all of the withdrawals made by or for the Petitioner. The result was combined with the records of the card room and constituted the [8] Petitioner's gross income. From this Mr. Murton would deduct the Petitioner's deductible expenses. Annual summary sheets prepared by Mr. Murton were then given to Mr. Calegari, who used them in connection with the other records in his own office in the preparation of Petitioner's income tax returns.

The sole issue in this case is whether or not Petitioner actually reported all of his gross income. Mr. Murton's method of reporting income was necessitated by the impracticability of maintaining records of income and disbursements which could be seized by law enforcement officers. Unfortunately, Mr. Murton is dead. We have been able to locate the

bank account and canceled checks for the last eleven months of the year 1950, but although we have made a diligent effort, we have been unable to find any other bank statements, canceled checks or memoranda pertaining to the other years involved here. The method followed by Mr. Murton was consistent throughout the years and did reflect the Petitioner's actual income.

Second, Petitioner's 1948 and 1949 income tax returns were audited by Mr. Perenti, an Internal Revenue Agent, just a few months prior to the levy of the jeopardy assessment in this matter. Mr. Perenti made no objections to the method of accounting employed by Mr. Murton. Perhaps I should mention here that when Mr. Cohen took over the Kingston Club he asked Mr. Murton if the method of reporting income was adequate and [9] Mr. Murton replied that he had a letter from the Internal Revenue office in San Francisco stating that the method employed by Mr. Murton, of reporting income, was acceptable to that office. Mr. Perenti issued a Revenue Agent's Report which we will offer into evidence and which shows several adjustments to Petitioner's income tax returns but does not question the adequacy nor the honesty of the method of accounting employed by Mr. Murton.

Third, at our request Mr. Calegari has prepared a detailed net worth statement based upon all available documentary evidence. Like Mr. Murton, Mr. Calegari has disregarded the \$3,000 cash revolving fund, which is not established by any documentary evidence. The Petitioner's net worth at the begin-

ning and end of each of the taxable years involved here is consistent with the income reported on his income tax returns.

Fourth, the Petitioner's expenditures, standard of living and personal withdrawals are consistent with the withdrawals shown upon his income tax returns. His expenditures and living expenses were modest and well within the income disclosed by his tax returns. Upon the presentation of this evidence, we feel that we shall not only have dispelled any presumption in favor of the Commissioner's determination, but will have affirmatively established that this Petitioner correctly reported his income for the years in question. [10]

The Court: Mr. Sherwood, as I gather it—and I am not talking in terms of amounts or comparison with the return—you do agree that the Petitioner had income from the Knigston Club and also income acting as a betting commissioner, whatever the amounts may be? Do I understand that as far as the return itself was concerned, that there was no segregation as between the two, with respect to gross income deductions, and so forth?

I understand that there was a separate set of books for the Kingston Club, but I am talking about the return itself.

Mr. Sherwood: I think that is correct, as far as the return is concerned. However, the summary sheets which Mr. Murton furnished to Calegari, who made the returns, are available and they do have the segregation.

The Court: Do I infer from your opening state-

ment that you also maintain that the Kingston Club and the activities as betting commissioners were the only income producing activities of this Petitioner other than perhaps income from investments?

Mr. Sherwood: Yes, sir; the financial statement which we will submit has all the sources, but as I recall it, the income outside of this came from securities and a partnership with his brother, but the respondent has not questioned in any way the adequacy of those records which were kept by Mr. Calegari in his own office. The only income which has any [11] pertinency here, which is in issue, would be from the Kingston Club.

The Court: From the Kingston Club? I thought that was the income that you said was clear and acceptable and it was the betting commissioner's income?

Mr. Sherwood: In his records he used Kingston Club to describe both activities. For clarification I have tried to use the word "card room" and "betting commissioner" which were combined.

The Court: I think that is a convenient way to put it.

Mr. Sherwood: There is no question about the card room, your Honor. We have those records here and I think they were examined by the Revenue Agents, by Mr. Perenti, at least. As far as I know, there is no controversy about them.

The Court: It is your position that there is no problem about the card room but there is about the betting commissioner, and there is also no problem about income from investments?

Mr. Sherwood: I think that is correct. I think counsel will agree with that.

The Court: I will no doubt hear his views. I wanted to get your position clear in my own mind first.

Very well, Mr. Nyquist?

Mr. Nyquist: I have a brief statement, your Honor. [12]

Opening Statement on Behalf of Respondent

Mr. Nyquist: It is shown by stipulations that during the years 1948, 1949 and 1950, and prior thereto, Lesly Cohen was engaged in various activities, among others, as a bookmaker and betting commissioner in San Francisco and elsewhere. He filed his returns on the cash basis.

About the end of 1950 taxpayer's returns for 1948 and 1949 were investigated by a Revenue Agent and Mr. Perenti. This was a routine investigation. Mr. Perenti never saw the taxpayer's books of account. He worked from certain work sheets that were furnished to him and he made test checks to determine whether certain expenditures were proper. He disallowed certain expenditures; he prepared a report which the Petitioners say they will introduce in evidence, and the taxpayer stipulated to the deficiency shown thereon and paid those amounts.

Later in 1952, Revenue Agent Glenn Adrian was assigned to the case of this taxpayer. Mr. Adrian had more information to work with than Mr. Perenti did because Mr. Adrian had photostatic copies of checks that had been received from various collection districts throughout the United States, show-

ing payments made to Lesly Cohen. Mr. Adrian made a number of attempts to get access to the taxpayer's books and records so that he could check to determine whether these checks had in any way been taken into account in the taxpayer's records. He was told by [13] an accountant and others that the taxpayer's books and the records were in the hands of his attorney. When Mr. Adrian talked to the attorney, the attorney said he would consider letting Mr. Adrian see the books and records.

After a lapse of a few weeks when Mr. Adrian again approached the attorney, the attorney stated that he had considered the matter and was not going to give Mr. Adrian access to these books. In the petition, the Petitioner makes the statement that the Respondent arbitrarily disregarded the Petitioner's books and records. The plain fact of the matter is that Respondents made repeated efforts to get access to Petitioner's books and records and was denied such access. Whether the denial was arbitrary or whether it was for some good reason is not important.

The point is that Respondent was denied that access. Respondent did not in any way arbitrarily disregard the books. Mr. Perenti then proceeded to check as best he could from third party records. This involved going to the bank where Mr. Cohen had his business checking account. I misspoke myself. I used the word "Perenti" when I meant Revenue Agent Adrian was denied access to these books and he had to check from third party records. He went to the bank. He found the bank records showing deposits. He found deposit tags which showed

the amounts of checks deposited and the bank from which they came. He found bank statements which showed the amount of [14] checks written on the accounts.

The information that the bank did not disclose was either the name of the parties who issued the checks that were deposited in the bank nor the parties to whom payments were made nor the nature of the payments that went out of the bank, but by having photostatic copies of many checks payable to Mr. Cohen, Mr. Adrian was able, by comparing the dates on which the checks were shown by the bank stamps, by comparing these with the information on the deposit tag, he was able to determine which of these checks were deposited in the bank account and which were not.

Over this three-year period, Mr. Adrian discovered checks totalling a little over a quarter of a million dollars that were cashed without going into the bank. The deposits in the bank account during the same three-year period before this Court exceed a million dollars. How many other checks there are that were not deposited we have no way of knowing. We know the checks discovered total over a quarter of a million. That information is largely contained in the stipulation of facts and it will not be necessary to take the Court's time in preparing that item by item. It is in summary form.

Being denied access to the taxpayer's books and records, Mr. Adrian had no choice but to add to the income reported on the taxpayer's return these huge amounts of bank deposits and cashed checks that

he found that were far in [15] excess of any amount shown as assets on the return.

Respondent has not disallowed any deductions claimed by Petitioner on the return. Petitioner now apparently contends that there are payouts which would offset these receipts. As to whether such pay-offs existed, or the amounts thereof, we will have to see what evidence can be produced. Petitioners have shown Respondent no evidence, no records of any such payoff, and Respondent did not, in the course of its investigation, find any evidence which would substantiate any payouts.

The Court: Are these payouts alleged to have been cash?

Mr. Sherwood: Is that addressed to me, your Honor?

The Court: I am just asking.

Mr. Sherwood: The bulk of the business was in cash. As counsel said, probably there are more checks than the ones he had.

The Court: I understand. I am not asking for argument at the moment, but Mr. Nyquist has made certain statements. I wanted to pin it down in my own mind because I would think, rather obviously, if they had been in a form substantially other than cash, assuming there were payouts, that some evidence would have been available. I will await the development of the evidence before I get the picture. I just wanted to get it as clear as I could at the moment, where we stood. [16]

Mr. Sherwood: The bulk of the payouts were in

cash. I think I said in my opening statement that he made out of town by check locally in cash.

The Court: Mr. Nyquist will insert the word "allege" in front of "payouts" and we will go on from there.

Mr. Nyquist: As I say, Mr. Adrian was forced to do the best he could with the information available. He found information that definitely showed that Lesly Cohen received the money. He added them to the income reported on the return. He had no information that would justify the allowance of any additional deductions that were not claimed on the returns. He was told that the Petitioner had books and records.

It was to be expected that if the Petitioner had these records he would, when the proper time came, substantiate these payoffs. Mr. Sherwood has stated that he expects to introduce evidence of the Petitioner's net worth. In other words, use a net worth method of computation to show what the Petitioner's income was over this period. Respondent, when the time comes, will offer objection to such proof for the reason that it is irrelevant.

It is irrelevant for two reasons. One, when the Petitioner—pardon me—the Internal Revenue Code of 1939 provides that when the Petitioner fails to maintain and keep adequate books and records, it is the Respondent, the Commissioner, who has a right to select a method of computing [17] income. It is not the Petitioner's right to select a net worth method of computing his income.

Secondly, the net worth method of accounting as

employed here, where the Petitioner is doing a lot of cash business, has large amounts on hand, is a method which would mean practically taking the Petitioner's word for cash on hand, which in substance, is almost the same thing as taking his word for his income. It is no stronger proof than Petitioner's own statements, just as his offering on the income items themselves.

The Court: Mr. Nyquist, just one question. In your statement you have added to Mr. Cohen's alleged activity, that of bookmaker; is that advisedly? You expect to introduce proof that in addition to operating the so-called Kingston Club card room and as betting commissioner, that he also was a bookmaker?

Mr. Nyquist: Your Honor, I do not intend to offer any proof on that particular point, for the reason that it is covered by the pleadings. Paragraph 7(a) of Respondent's answer states:

"The Petitioner during the years 1949 to 1950, inclusive, and prior thereto, was engaged in various business activities, i.e., as a bookmaker and betting commissioner in the City of San Francisco and elsewhere."

That allegation in Respondent's answer is not denied [18] in the reply, and therefore, under the Tax Court's Rules of Procedure, stands admitted.

The Court: It stands admitted provided the pleadings to that extent are offered in evidence or a motion is made to be admitted. The presentation

of the case is up to you but I don't understand the pleadings are in evidence unless offered.

However, that is a matter for later consideration. It is hardly part of an opening statement anyhow. I just wanted to get my mind clear on what you were alleging. Your method of proof is up to you.

Mr. Nyquist: I am relying on Rule 18(b) of the Tax Court Rules.

The Court: Proceed, Mr. Sherwood.

Mr. Sherwood: I would like to call Mr. Calegari, your Honor.

Whereupon,

ADOLPH CALEGARI

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: My name is Adolph A. Calegari. My office is at 619 Mission Street, San Francisco.

Direct Examination

By Mr. Sherwood:

Q. What is your business or profession?

A. Certified public accountant.

Q. How long have you been a certified public accountant? A. Twenty-five years.

Q. And how long have you practiced your profession in San Francisco?

A. I have had my own office since 1932, 24 years.

(Testimony of Adolph Calegari.)

Q. Are you acquainted with Petitioner in this case, Lesly Cohen? A. Yes.

Q. How long have you known Mr. Cohen?

A. I have known Mr. Cohen for twenty years.

Q. Have you had occasion to render professional services to him? A. Yes, I have.

Q. And over what period of time have you rendered professional services to Mr. Cohen?

A. Approximately 15 years.

Q. And would you state what those services consist of?

A. My services consisted of maintaining a set of books for his investments, for his stocks and bonds, and in compiling that information, together with the information supplied by Mr. Cohen and—by his accountant on his Kingston Club operations [20] and preparing his federal and state of California tax returns.

Q. In connection with investments, is there also a partnership to which you rendered professional services?

A. That is right; there is a partnership that Les Cohen has with his brother Herbert.

Q. What is the nature of the partnership?

A. A joint venture that owns stocks, principally stock.

Q. Who keeps the books of that joint venture?

A. The books are kept in my office.

Q. If I understand you correctly, all of Mr. Cohen's investments and transactions are handled in your office except matters in connection with the

(Testimony of Adolph Calegari.)

Kingston Club? A. That is right.

Q. And what type of material did you receive to be used in connection with the preparation of income tax returns from the Kingston Club operation?

A. The data that I received from the accountant for the Kingston Club was in the nature of a profit and loss statement and a balance sheet at the end of each year.

Q. I will hand you this document, Mr. Calegari, and ask if you know what it is?

A. This is a statement on the George T. Murton Audit Company letterhead indicating the balance sheet as of December 31, 1949, and a profit and loss statement for the year 1948.

Q. I believe you just handed me that statement the other [21] day in my office, did you not? It was in your possession, was it not?

A. It was in the possession of Mr. Lewis. It had been originally in my possession.

Q. And how did it come into your possession?

A. I believe it was mailed to my office by the office of Mr. Murton.

Q. And did you use that document for any purpose after you received it?

A. I used it in order to prepare the tax return for Mr. Cohen for the year 1948.

Q. I show you this document, Mr. Calegari, and ask you if you know what that is?

A. This is a balance sheet prepared on the letterhead of the George T. Murton Audit Company, as

(Testimony of Adolph Calegari.)

of December 31, 1949, and attached to it is a profit and loss statement on the Kingston Club for the year 1949.

Q. Was that document in your possession?

A. Yes.

Q. Can you state how it came into your possession?

A. I received it by mail from the office of the George T. Murton Audit Company.

Q. After you received it did you use it for any purpose?

A. I used it in order to prepare the 1949 tax return of Lesly Cohen. [22]

Q. I will show you this document and ask you if you know what that is?

A. This is a handwritten statement of the income and expenses for the year 1950.

Q. Income and expenses of what?

A. Of the Kingston Club, and at the bottom is a summary of the financial position at the beginning and the end of 1950.

Q. And was that document in your possession?

A. Yes; it was.

Q. And how did you receive it?

A. I received it in the mail from the office of the George T. Murton Audit Company.

Q. Did you have occasion to use it?

A. I used it in the preparation of Mr. Cohen's 1950 tax return.

Mr. Sherwood: If the Court please, the document the witness has just identified is in handwrit-

(Testimony of Adolph Calegari.)

ing, and I believe it is the handwriting of Mr. Murton. I am going to have one of Mr. Murton's assistants, a man who worked for him part of the period, who will be here this afternoon. He can identify the handwriting. But I thought for the convenience of the Court it might be more convenient to substitute a typewritten copy, which is more legible.

Is there any objection, Mr. Nyquist?

Mr. Nyquist: I am not stipulating that in evidence [23] at the moment anyhow.

The Court: It is a problem of substitution. We can take care of that. As I understand it, it is not offered in evidence at the moment.

Q. (By Mr. Sherwood): Is there a segregation on the annual reports that you have just identified, Mr. Calegari, whereby the income and expense of the cardroom are segregated from the betting commissioner's business? A. There is.

Mr. Nyquist: Objection, your Honor. The document speaks for itself.

Mr. Sherwood: I wanted to explore a little of the method of accounting.

The Court: The paper isn't in evidence yet. I don't get the object of the particular question asked.

Mr. Sherwood: I will withdraw the question at this time. Counsel is probably right, except the terminology used is not the same terminology as the ones we have been using in court in all cases.

The Court: Mr. Nyquist, in order to go along,

(Testimony of Adolph Calegari.)

do you have any objection to these questions subject to their being followed up by proof and admission of this particular document?

Mr. Nyquist: Yes, I do, your Honor. I don't see that; this witness did not prepare these documents, didn't see the [24] books and records. He merely copied something off these documents onto the returns; therefore, I don't think that this witness can in any way identify these documents in any way that will substantiate the returns.

The Court: If there are any expressions of particular use in the type of business in which the taxpayer was engaged, wouldn't it be helpful to have some explanation of that terminology?

Mr. Nyquist: If they are explanations of terminology I have no objection.

Q. (By Mr. Sherwood): I call your attention, Mr. Calegari, to the fact that on the 1948 sheet there is terminology used here of "cards" and "horses." On the 1949 statement there is a statement, "bank-roll (cards)" and one for "horses." On the 1950 return there is a column entitled "cards" and one entitled "events."

Just as a matter of clarification—perhaps there will be no objection to asking a leading question—as I understand it, under "cards" refers to the card-room in all cases, the card activities?

A. That is my understanding.

Q. But "horses" also embraces all athletic events. It wasn't intended to apply just to horses

(Testimony of Adolph Calegari.)

but to all the activities of the Petitioner outside the cardroom?

A. That is my understanding. [25]

Q. And the expenses which are set forth on these sheets evidence the fact that is a fact, expenses are expenses of the betting commissioner's business?

A. That is my understanding.

Mr. Sherwood: Your Honor, I would like to offer in evidence the sheets for the year 1948, which the witness has identified as being the summary which he used in the preparation of the income tax return, and it is my understanding the income tax returns are in evidence by stipulation.

Mr. Nyquist: They are not in as yet, but I will be glad to put the stipulation in at any time.

Mr. Sherwood: Suppose I withdraw this for a moment. We have the stipulation, but I thought it had been filed.

The Court: Let's put the stipulation in. Is there anything that I need to read in it that hasn't been covered in the opening statement?

Mr. Nyquist: I don't believe so, your Honor.

The Court: As I gather it, after this is offered, if counsel wanted a brief intermission this morning—that having been received—if counsel wants to, we will take a recess for ten minutes.

(Short recess taken.)

The Court: On the record.

Mr. Sherwood: Counsel is willing to stipulate that a copy of the Revenue Agent's report, which

(Testimony of Adolph Calegari.)

is identified as the [26] examining officer, R. Perenti, may be offered and received in evidence.

Mr. Nyquist: No objection.

The Court: Very well.

The Clerk: Exhibit 6.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 6.)

Mr. Sherwood: I would like to offer the statement as of December 31, 1948, which this witness has identified and testified that he used in connection with the income tax return in evidence as Petitioner's Exhibit next in order.

Mr. Nyquist: Objection, your Honor. There is no proper foundation laid. It has been referred to as a summary, but no showing of what it is a summary. This witness did not prepare the summary; this witness merely copied it on the schedule of the return and it carries no more weight, and is nothing more than a Schedule C on the return itself.

Mr. Sherwood: But it is part of the work papers of the man who prepared the return. I think the weight of the evidence is something else. We will have to perhaps bring out various sources from which this data was compiled, but I think the document is relevant anyway.

The Court: What makes the work papers of the man who prepared the return relevant unless a foundation is laid for the work papers? [27]

Mr. Sherwood: He has stated that this summary was given to him by the accountant.

(Testimony of Adolph Calegari.)

The Court: He said the accountant mailed it to him, as I understand it, but he hadn't said what the accountant's sources were, and it is my understanding that it purports to comprise the income from both the cardroom and the betting commissioner's activities, and the only books and records that purport to be in the room relate solely to the cardroom.

Mr. Sherwood: That is correct, your Honor, as far as it goes. However, I can ask the witness this question also. He knows, I believe, Mr. Murton is dead.

Q. (By Mr. Sherwood): Is that right?

A. Mr. Murton is dead.

Q. I believe he died in 1950?

A. I am not sure.

Q. Were you employed by Mr. Lewis, counsel for the Petitioner, to make an independent examination of the available records, bank accounts and so forth, of the Kingston Club following Mr. Murton's death? A. Yes; I was.

Q. And what bank records were you able to find?

A. I was able to find the cancelled checks and bank statements beginning with the month of February, 1950, through December of 1950. [28]

Q. Were you able to locate any data for the month of January, 1950?

A. I was able to obtain a copy of the bank statement for January of 1950, from the bank.

Q. What did you do in connection with the bank statement and cancelled checks for the year 1950?

A. I prepared a summary indicating the dis-

(Testimony of Adolph Calegari.)

bursements made from that account month by month for the year 1950.

Q. And did that disbursement include disbursements for both the cardroom and the betting commission business?

A. My understanding is that there was just one bank account, and I presumed that the disbursements made from it were for both departments.

Q. Were any of the data which you had in your possession indicating the payment of bets?

Mr. Nyquist: Calling for a conclusion of the witness, your Honor, and I object.

The Court: I will sustain the objection, Mr. Sherwood. You have asked this witness whether something or other indicates certain things to him. We don't have in evidence what he is talking about. We don't have any foundation as to how or why they indicate anything to him. He examined some bank statements. I don't know whether the bank statements are in the stipulation or not, but I don't know of any particular basis for this witness' inferences from them. Are they in the [29] stipulation?

Mr. Lewis: No, your Honor.

Mr. Sherwood: Only the deposits. However, I can go ahead and clear that up.

The Court: Respondent's objection is sustained.

Q. (By Mr. Sherwood): Do you have an analysis in your work papers, Mr. Calegari, showing the disposition of funds that were in the bank during the year 1950? A. Yes; I do.

(Testimony of Adolph Calegari.)

Q. Would you state just in general for us what these sheets are? You have shown us three sheets.

A. The heading is "Lesly Cohen, disbursements, checks, Kingston Club, 1950," and it is headed up with a total and then each of the months, January through December.

Mr. Sherwood: Mr. Nyquist, we furnished Mr. Adrian with photostatic copies of these sheets. You probably have them.

Mr. Nyquist: I recognize that sheet.

Q. (By Mr. Sherwood): Proceed.

A. On it is listed the person or organization to whom the checks were made payable, and the amount of the disbursements, the amount of the checks month by month, which would ultimately be the total—which was totalled. After I completed the summary [30] I conferred with Mr. Cohen and he indicated to me which ones were in payment of bets. I then prepared a summary of the information that is on these sheets, which formed the basis for one of the schedules on the report that I prepared.

Mr. Nyquist: There is one point I would like to clarify. You stated you gave Mr. Adrian a copy of this schedule, and I stated yes, but I wish to clarify the point that this was not done prior to the issuance of the 90-day letter.

Mr. Lewis: That is right; it was done subsequently. All the information furnished was after the 90-day letter.

The Court: All right; proceed.

Q. (By Mr. Sherwood): Did you make a simi-

(Testimony of Adolph Calegari.)

lar analysis of the bank account for the year 1949?

A. I did not.

Q. Did you make a similar analysis for the year

1948? A. I did not.

Q. Can you state why not?

A. There were no cancelled checks, no check stubs or bank statements available to me for those years.

Q. Did you make an effort to look at them?

A. Yes.

Q. What did you do?

A. I conferred first of all with the attorney, John Lewis, and also with Lesly Cohen and also with the office of [31] Murton.

Q. Who was in Murton's office after Mr. Murton died?

A. A Mr. Ebje, certified public accountant.

Q. Did you ask Mr. Evje if he knew where the bank statements were?

A. Yes; I did. He indicated that there were records stored—

Mr. Nyquist: Objection, your Honor, hearsay testimony.

The Court: Let the answer, "Yes; I did," in and strike out the balance of the answer.

Q. (By Mr. Sherwood): And did you make any inquiry of anyone else other than those that you have mentioned?

A. Yes; I did. There is an accountant here in San Francisco, a certified public accountant, who took over a portion of Mr. Murton's practice, and

(Testimony of Adolph Calegari.)

some of Mr. Murton's records were believed to have been in his possession.

The Court: Mr. Sherwood, why are we going into this? Suppose he did inquire of a number of certified public accountants or anybody else. Where does that place his testimony; what does that add to the case?

Mr. Sherwood: I am just trying to establish, your Honor, that we made diligent effort to get the same data for preceding years that we actually have for 1950. We were unable [32] to do it because of Mr. Murton's death.

The Court: Does counsel for the respondent question that an effort was made to get this information?

Mr. Nyquist: Your Honor, we are not in a position to stipulate anything about the effort made. The petition states that the taxpayer kept complete books and records showing these transactions, and we are consequently not going to enter any stipulation to that effect.

The Court: He is just being asked whether he made inquiries; as I understand it, there is no objection to him being asked that, so go ahead.

The Witness: The man's name is William J. Ker, Certified Public Accountant, 1095 Market Street. Mr. Ker indicated that after a search of his records he was——

Mr. Nyquist: Objection, your Honor.

The Court: Strike out from the words, "Mr. Ker indicated" on to the end of the answer, and

(Testimony of Adolph Calegari.)

will you, Mr. Calegari, please answer the precise question asked? If there is anything further to be asked, Mr. Sherwood will ask it and don't volunteer information.

Q. (By Mr. Sherwood): Did you in fact receive any information from any of the people that you have just stated that you talked to concerning the bank account, cancelled checks for the years 1948, 1949? A. I did not. [33]

Q. In looking at page one of your work papers, I notice a red letter "B" appearing frequently down the page. Can you state what that means?

A. Those indicate the disbursements for bets.

Q. And are the other things identified as to what the disbursements were for, those that are not marked with "B"?

A. The rest are indicated from the payee, the expenses indicated by the party to whom the disbursements were made, like the telephone.

Mr. Nyquist: Your Honor, I will not object to this testimony, but this is a conclusion of this witness who prepared those papers. I don't quite see that it is going to add much, but if he is trying to prove he had information, I want him to show the source of that information. If it is just his conclusion, I wish you would make that clear.

The Court: As I understand it, the schedule isn't in evidence yet?

Mr. Sherwood: That is right.

The Court: It hasn't been offered. This witness is explaining, as I understand it, his own symbols

(Testimony of Adolph Calegari.)

and he hasn't explained why he used those symbols, or what basis, if any, supports them. Do you have any different view of that, Mr. Sherwood?

Mr. Sherwood: He did testify that he discussed the matter with the petitioner. [34]

The Court: He testified that he discussed the matter with the petitioner, but he didn't testify, and over objection, he couldn't testify what the petitioner told him. If petitioner is going to take the stand and identify the items it is a different proposition.

Mr. Sherwood: In view of the fact, your Honor, that the testimony now shows that Mr. Murton is dead, these records were kept by him, these sheets were furnished by him to Mr. Calegari for the purpose of using them in the tax returns, and that they were in fact so used, and the returns are in evidence, I would like to renew my offer that the document which is entitled "Kingston Club, December 31, 1948," be admitted into evidence.

Mr. Nyquist: I would like to renew my objection. It is a document that purports to be a summary without any foundation being laid for the summary. It proves nothing more than Schedule C in the return itself. It is merely a copy of Schedule C.

The Court: I have heard nothing yet, Mr. Sherwood, which would indicate what Mr. Murton's basis was for his papers. My understanding, again, is that the only books and records in this courtroom have to do with the cardroom, and as to that I

(Testimony of Adolph Calegari.)

gather from you there isn't any dispute anyhow. What Mr. Murton's basis was for his schedule with respect to the income from Petitioner's activities as betting commissioner is not [35] before us, as far as I know. This purports to be a summary made up by an accountant who is now dead, but what he made it up from, and the authentication of what he made it up from, and the basis for his summary is not before us, as far as I can see.

I will have to sustain the objection.

Mr. Sherwood: Well, your Honor, will realize that we are placed in a very difficult position by reason of Mr. Murton's death, but we will do what we can this afternoon with Mr. Evje.

The Court: All I can say, Mr. Sherwood, is I am sure you will do your best, but the Court must have the satisfaction of knowing that the Court didn't put you in the position you are in. I have to rule on matters as they are presented.

Q. (By Mr. Sherwood): Mr. Calegari, were you employed by the attorneys for the petitioner to make an audit of all Mr. Lesly Cohen's affairs for the years 1948, '49 and '50? A. Yes; I was.

Q. And did you in fact make such an audit?

A. I prepared a report.

Q. And upon what information or data was that report based?

A. Insofar as Mr. Cohen's assets, liabilities [36] and income and expenses were concerned, with the exclusion of the Kingston Club matter, I have com-

(Testimony of Adolph Calegari.)

plete and thorough records substantiating everything that I have in my report.

Q. Where are those records kept?

A. In my office.

Q. And by whom were they kept?

A. By one of my assistants.

Q. Proceed.

A. As far as the Kingston Club matter is concerned, the information that is presented in my report was taken from the summary sheets which are already subscribed, together with the analysis of the disbursements from the bank account for the year 1950.

Q. Did you take into account any cash which was not evidenced by any documentary proof?

A. I did not. There was no way for me to know the amount of the cash on hand either at the beginning or the end of any particular period. The amounts had apparently been disregarded by the accountant Murton, and in the interests of being consistent, I also ignored them.

Q. Is this the report which you prepared?

A. Yes; it is.

Q. I call your attention to Exhibit A attached to it, or included in the report, and ask you what that is?

A. Exhibit A is a summary of Mr. Lesly Cohen's net worth [37] for the period from January 1, 1948, to December 31, 1950.

Q. Is there included in that summary of his net

(Testimony of Adolph Calegari.)

worth, the interest that he has in the partnership with his brother that you described awhile ago?

A. That is also included.

Q. And the securities which he owns, are they included? A. That is right.

Q. As I understand you, then, aside from any investment in the Kingston Club, you have in your own office the records upon which the net worth statement is based? A. That is right.

Q. And you have kept those records for approximately how many years?

A. Ten or fifteen.

Q. Calling your attention to the year 1950, I will ask you if the schedule pertaining to the operation of the Kingston Club in 1950 is the same as the summary which you received from Mr. Murton, or whether you made any changes or adjustments in it?

A. It is not the same. I discovered several items of a personal nature which had been considered as expenses and which I eliminated in arriving at a smaller loss than that indicated by Mr. Murton's figures.

Q. Did you discover those items through the analysis of the bank account that you just [38] described? A. I did.

Q. Was there an adjustment also for income taxes paid on the deficiency on the Perenti report?

A. That was one of the items that had been overlooked as a personal withdrawal rather than as an expense in that year.

Q. And what is the effect of that adjustment

(Testimony of Adolph Calegari.)

that you made on the amount of loss shown on the tax return?

A. Mr. Murton's original figures showed a loss of some \$26,000. The adjustments that I found reduced the loss by \$9,800.

Q. You have included in this report separate schedules for the partnership account referred to, have you? A. Yes; I have.

Q. And also the individual investment account of Mr. Cohen? A. That is right.

Mr. Sherwood: I would like to offer this report. Counsel has been furnished with a copy of it.

Q. (By Mr. Sherwood): Did you furnish it, Mr. Calegari? A. Mr. Lewis did.

Mr. Nyquist: Objection, your Honor. This report is largely the conclusion of this witness. It is based, to a large extent, upon the documents which in themselves under the Court's previous ruling, were excluded from evidence, and from [39] Mr. Murton's sheets which form a basis for part of this and has been shown by Petitioner's own testimony to be inaccurate, and it does not purport to be any summary of any books and records. It is unsupported by this witness, and to a very great extent——

Mr. Sherwood: I will have to take exception to that statement, your Honor. The biggest part of this report——

Mr. Nyquist: I shouldn't say it is nothing but unsupported; I should say it is to a large extent unsupported conclusions of this witness, and to the

(Testimony of Adolph Calegari.)

extent that it relates to the items in controversy, it is unsupported conclusions of this witness. The items not in controversy, I think he has documentary evidence to support.

Mr. Sherwood: I might say, your Honor, of course, this was suggested by counsel's opening statement this morning concerning the net worth. As I indicated, we believe that the net worth of the Petitioner as shown by record, for which there is no question, they are in the hands of the certified public accountant, are corroboration of our general position.

I am not taking the position that we are entitled to prove the man's income by net worth. I am not raising that, but it is corroboration.

The Court: Mr. Sherwood, let's get to the point at issue. In the first place, in his objection, Mr. Nyquist does not mention any objection to the net worth basis and subject [40] to any argument he may have later, it would be my tentative view, at any rate, that you had every right to offer a net worth computation, if it were properly supported as an indication of the correctness or incorrectness of your position.

It doesn't mean that you are reporting to the net worth basis. It is a matter of evidence, but that is not before us now. This witness has produced a report. The report is worth nothing unless the basis for the report is established in the record or is here and available, subject to analysis, and while all

(Testimony of Adolph Calegari.)

this data which the witness may have in his own office may be highly satisfactory to him, I haven't heard a word as to what it is or whether it would be satisfactory to me.

There isn't the slightest indication that any material part of this report which covers anything that is in dispute is supported by anything in this room or by any evidence which is in the record or by the stipulation, so far as I know. The mere fact that a report is gotten up by a certified public accountant doesn't, as far as I know, give it any particular standing, any particular sanctity or make it admissible in evidence.

As I understand, Mr. Nyquist's objection is that substantially this report taken as a whole is unsupported as far as the record is concerned, up to the present time, and that is my impression, too, and subject to anything that you have to say, at this point I would sustain the objection. [41]

Mr. Sherwood: There is no question but what some portions of the report are based upon the Murton summaries because that is all there were, but the biggest part of this report is made up of schedules prepared by Mr. Calegari from his own record which he keeps.

The Court: He kept his own records and no doubt will continue to keep them, but where did he get them in the first place? I don't know.

Mr. Sherwood: I might ask him that.

Q. (By Mr. Sherwood): Showing you Exhibit B(5) on this report, which has a list of stocks on

(Testimony of Adolph Calegari.)

this sheet, this purports to have a list of stocks, the date acquired, the number of shares and the cost.

The Court: Is that particular schedule in issue?

Mr. Nyquist: I don't see where it really comes into issue. I haven't checked the accuracy but I don't see the materiality.

The Court: As I understand it, that part of the case is not in issue.

Mr. Sherwood: It is part of his net worth. I thought we should establish that.

The Court: It is part of his net worth, and as far as I am concerned, if you can build a complete net worth from this witness' testimony, and that of a dozen others, it is all right with me, but a net worth statement with one item proved, [42] or five items proved out of fifty—and I am using that as an example—is not a net worth statement by any means.

Mr. Sherwood: True, but I can only prove one thing at a time, and I would like to go as far as I can.

The Court: But you are offering this one report at the moment. Perhaps you can go ahead on this one schedule.

Q. (By Mr. Sherwood): The schedule at the bottom shows a total value of \$88,568.17. Do you find that?

A. That is the total amount of the cost of the stocks that are owned by the joint venture of Lesly Cohen and his brother, Herbert A. Cohen.

Q. What we want to know is upon what did you

(Testimony of Adolph Calegari.)

base this Schedule B(5)? Where did you get the information?

A. The information from which this schedule was prepared were the broker's statements who actually had custody of the stocks.

The Court: Mr. Nyquist, can't you stipulate?

Mr. Nyquist: I have no objection to Schedule B(5).

The Court: Very well; Schedule B(5) will be received.

Mr. Sherwood: Well, Schedule B(6) then, which is an even longer list of stocks——

The Court: Why can't you run through this with Mr. Nyquist and see what schedules he is willing to accept and [43] then confine yourself to the others? It seems to me we will move faster.

Mr. Nyquist: I might say, in stipulating these schedules I will stipulate that the Petitioner owns these stocks and this witness found them. I do not thereby purport to stipulate that he owns——

The Court: You stipulate that he did own these stocks and that the cost figures are accurate?

Mr. Nyquist: Yes, your Honor.

The Court: Very well. Is there anything else in here that you can stipulate, Mr. Nyquist?

Mr. Sherwood: How about Schedule B-8, Notes Payable?

Mr. Nyquist: We have no information on that, your Honor. I don't know what it is.

Q. (By Mr. Sherwood): What information do you have on it, Mr. Calegari? Did you see the notes

(Testimony of Adolph Calegari.)

that you put out here? A. Yes; I did.

The Court: Are they in court?

Mr. Lewis: They are here; the largest one, your Honor. I think I have the others some place in the file.

The Court: I am not going to admit the schedule, Mr. Sherwood, unless the notes are in Court, subject to examination by respondent counsel.

Mr. Lewis: Your Honor, this morning you suggested you [44] wanted to leave early. I think we could take that schedule and the records here during the noon recess and probably stipulate to certain matters except what Mr. Cohen will have to testify to.

The Court: I would hope so, gentlemen. These matters are matters which normally should be taken up before the trial. I don't say that in any sense of criticism because about 80% of the time they are not taken up prior to trial, but it does seem to me that if any items can be eliminated by stipulation, that it ought to be done, and I will give counsel time to do it, within reason.

Do you want to go on with this witness for about ten minutes longer or do you think you could use your time better otherwise, Mr. Sherwood? I will leave it to you.

Mr. Sherwood: I think, in view of our conversation this morning, for a little longer noon recess we would just as well adjourn now, if it is agreeable with the Court.

The Court: As far as I know, I won't be able

(Testimony of Adolph Calegari.)

to get back until about 2:00 o'clock. If counsel and the witnesses are here, and I get back earlier, I will be ready to proceed.

But, Mr. Sherwood, I am not ruling on anything because I don't have anything before me at the moment, but I have tried to indicate my policy as a guide to you, either in making objections or perhaps using other means to get your evidence in, but broadly speaking, and subject to whatever may develop, [45] I can't permit this witness to testify to summaries of unsubstantiated facts. You have got to have a basis for them before he can testify to them. The mere fact that he has some certified public accountant and a summary or statement, or the mere fact that he has got some record of his own, unless they are here and are proved to be proper, the mere fact that he is an accountant and makes some calculations, doesn't make his evidence admissible.

We might just as well face that and get down to the problem of proving what can be proved in the case. Again I am just talking broadly, to give you the advantage of being forewarned about it so that you can proceed as well as circumstances permit, to get the basis for your evidence, but I certainly don't intend to merely accept in evidence something which purports to be a certified public accountant's analysis simply because a certified public accountant made the analysis. He can only make it on the basis of something, and that something has to be in evi-

(Testimony of Adolph Calegari.)

dence, or here and of a nature which makes it appropriately subject to a summary.

If it is anything more—if anything needs clarification I will be glad to do it, but I am sure you know the rules better than I do, and I have no doubt you know the case better than I do. If there is anything further you want to inquire about I will be glad to listen to you, otherwise we will recess until 2:00 o'clock or a short time prior to that, if I [46] can return ahead of that hour.

Mr. Sherwood: We will be here shortly before that, your Honor, in case you should return.

The Court: Try to stipulate whatever you can, gentlemen. Let's confine this to what the real issues are.

(Whereupon, a recess was taken until 2:00 p.m.) [47]

After Recess

(Court met, pursuant to the taking of the recess, at 2:00 o'clock p.m.)

The Court: Proceed.

Mr. Sherwood: If the Court please, we had some discussion this morning of Mr. Calegari's report, and I have asked the clerk to mark Petitioner's Exhibit 7 for Identification.

The Court: Very well.

Mr. Sherwood: We have tried to follow the Court's suggestion before the recess, and clarify as many of these things as we can. Of the schedules

which are included in Petitioner's Exhibit 7 for Identification, Respondent has no objection to the following schedules:

B-1, B-2, B-3, B-4, B-5, B-6, B-8, B-9, C-1, C-2—
strike out C-1—C-2, C-3, C-4.

The Court: They will be received.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 7.)

Mr. Nyquist: That is correct, your Honor. Respondent has no objection in the sense that Respondent agrees that those schedules list assets and so forth owned by the Petitioner. We do not contend thereby that these necessarily reflect all of the assets of the type listed.

The Court: That will be numbered Exhibit 7, as one [48] exhibit.

Mr. Sherwood: Of course, it is my purpose by another witness to identify, lay a foundation for the other exhibits, and I hope eventually we can offer the whole exhibit as one exhibit without tearing it to pieces.

The Court: You can withhold it at this time, but we will understand that while it has been merely marked for identification, that the schedules with respect to which Respondent has no objection, will be received into evidence.

Mr. Sherwood: Thank you, your Honor. We have in court the bank statements for the year 1950, and the checks for the year 1950, except for the month of January. These have been exhibited to counsel and those that are shown on the witness'

report with a red "B" are now being examined by the Revenue Agent.

Counsel is making no objection to the admission into evidence of the three pages which the witness has identified as being Lesly Cohen distribution checks, Kingston Club, 1950; photostatic copies of these sheets were furnished to the Revenue Agent some months ago.

Mr. Nyquist: We have no objection to that schedule as a summary of the checks, with this qualification: That we are not stipulating to the identification placed on there by the witness which are in payment of bets. I request that it be understood that in stipulating to this schedule, we are not [49] stipulating to any of those initials or designations placed on there by the witness.

The Court: As I understand it, the figures and the written data are admitted except for the witness' inferences or conclusions or interpretations.

Mr. Nyquist: Yes; they are the marks which the witness used to designate what he thought were in payment of bets.

Mr. Sherwood: That is satisfactory. We will identify those checks by another witness.

The Court: Very well; subject to qualifications mentioned, that is received.

The Clerk: Exhibit 8.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 8.)

Mr. Sherwood: You may cross-examine.

Whereupon,

ADOLPH CALEGARI

having previously been duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Nyquist:

Q. Mr. Calegari, you prepared the income tax returns of the Petitioner, Lesly Cohen, for the three years involved before this Court? [50]

A. Yes; I did.

Q. Did you, in the preparation of those income tax returns, see any complete books of account in respect to all transactions of the Kingston Club?

A. I did not.

Q. Did you see any books of account?

A. Yes; I did.

Q. Do you have such books of account?

A. They are not in the courtroom today.

Q. Books of account of the Kingston Club?

A. No; you asked if I had seen books of account.

Q. Did you see any books of account of the Kingston Club? A. No; I did not.

Q. Did you ever see any books reflecting betting transactions? A. No; I did not.

Q. When you were shown this document which is marked Exhibit 7 for Identification, you stated that you had information supporting the various figures shown on Exhibit A in that document. Do you have Exhibit A before you so you can see what I refer to? A. Yes, sir.

(Testimony of Adolph Calegari.)

Q. On Exhibit A, I call your attention to a line where you say, "Deduct personal expenses to balance year, 1948, [51] \$10,578.11."

Do you have any documentation for that figure?

A. No, sir. I can explain, if you like, how I arrived at it.

Q. Was that figure arrived at by a basis of an inference on your part? Is that a figure that is based on inferences on your part?

A. No; that represents the difference between his net worth at the beginning of the year and the end of the year, after taking into consideration income after taxes.

Q. And that is the figure that is necessary to put in there to make it balance; is that right?

A. That is right.

Q. And is the same true of the corresponding figures, "Personal expenses to balance year, 1949," and "Personal expenses to balance year, 1950"?

A. That is right.

Q. Calling your attention to Exhibit C, was that schedule prepared by you for the purpose of showing Mr. Cohen's taxable income for this year, or these years?

A. That is right.

Q. And now calling your attention to a deduction at the bottom of that page, "additional federal and California income taxes, years 1948 and 1949," which you show in the amount of \$12,209.10? [52]

A. That is right.

Q. Why do you show that as a deduction in the year ending December 31, 1950?

(Testimony of Adolph Calegari.)

A. Well, because I indicate that as a liability at the end of 1950 so in order for it to appear as a liability it has to be a reduction of his income.

Q. Was that amount paid in 1950?

A. It was paid in 1951.

Q. Was this taxpayer on a cash basis?

A. Yes, he was. If I may add a comment there, I indicate in my report just what I have said, and the reason.

Q. Turning to Exhibit B, in the year 1950 you show at the bottom of the schedule, two amounts, one due to the Collector of Internal Revenue, and one due to the franchise tax commissioner, one in the amount of \$11,108.75; one in the amount of \$1,100.35.

Are those the same amounts we are talking about?

A. That is right; that is where I show the liability.

Q. And those amounts were not paid in the year 1950? A. They were not.

Q. They were liabilities that were not paid?

A. That is right.

Q. And yet this schedule was prepared for the purpose of computing the income of a cash basis taxpayer?

A. It is indicated on there simply to indicate there was [53] that indebtedness against that year's income.

Q. Then your figures don't purport to represent Lesly Cohen's taxable income for that year?

A. The taxes due the Collector of Internal Rev-

(Testimony of Adolph Calegari.)

enue aren't a deduction anyway, from a tax standpoint.

Q. But you place them on there as a liability?

A. I wanted to indicate on the statement that the examination had been made and that the taxes were due. It is purely a matter of convenience and I have indicated that on my report. I can refer you to it.

Q. That answers my question.

A. Thank you.

Q. Mr. Calegari, on the third page of your report you have a statement, and I quote:

“Based on the accounting method used, it follows that any decrease in expenses automatically decreases the receipts.”

A. That is right.

Q. Are you referring to an accounting method that you used?

A. No; the accounting method that I refer to is the method that was used on the Kingston Club record.

Q. It is a method that you understood was used on the Kingston Club records?

A. That is right.

Q. You did not maintain those records? [54]

A. No.

Q. And you did not see those records?

A. I saw the summaries only.

Q. This statement is not based upon your personal knowledge but upon your conclusion that you have reached, based on information that reached you?

A. Based on information supplied me.

(Testimony of Adolph Calegari.)

Mr. Nyquist: I have no further questions of this witness, your Honor.

Mr. Sherwood: We might wish to call Mr. Calegari later, but I think we will have to lay additional foundation before doing so.

The Court: Mr. Sherwood, I, of course, can't tell until you ask to bring him back, but I realize this is a complicated case, and my inclination will be to give every reasonable opportunity to see that justice is done.

Mr. Sherwood: We will excuse you for this time, Mr. Calegari.

(Witness excused.)

Mr. Sherwood: Mr. Evje.

Whereupon,

ARNOLD W. EVJE

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and your address for [55] the record.

The Witness: Arnold W. Evje, 110 Sutter Street, San Francisco.

Direct Examination

By Mr. Sherwood:

Q. What is your profession or occupation?

A. Certified Public Accountant.

(Testimony of Arnold W. Evje.)

Q. How long have you been a CPA?

A. Since 1949.

Q. And are you engaged in practice at this time?

A. I am.

Q. By yourself? A. No; in partnership.

Q. Were you acquainted with the late Mr. Murton? A. Yes; I was.

Q. In what connection did you become acquainted?

A. I worked for Mr. Murton from December 1, 1946, through approximately November 30, 1950.

Q. What, in general, did your duties consist of in that employment?

A. All types of accounting, income tax returns, general accounting business.

Q. Were you given access to all his records and accounts? A. Yes.

Q. Do you recall how Mr. Murton's health was in 1949 and [56] 1950?

A. Well, in 1950 he had a heart attack, I believe, just about March, and was out for approximately eight months from the office, or seven months.

Q. Who normally handled the accounting for the Kingston Club? A. Mr. Murton.

Q. During this period of eight months when he was out, who handled the accounting?

A. I handled the accounting for, I think, four months.

Q. And did you have any pattern or information, any format to follow?

A. I followed the work of Mr. Murton, his past

(Testimony of Arnold W. Evje.)

working papers, and if there were any questions, I imagine I asked him for a particular answer.

Q. You had access to the papers for a period prior to the time he had the heart attack?

A. That is right.

Q. And would you state what you did in the way of keeping records for the Kingston Club during the period which you personally kept them?

A. Well, I have some information here which would indicate the type of work that was done. It consisted basically of two types of record, one listing the operation, presumably, of the cardroom as such, prepared by Mr. Elbert Wright, which [57] would list his salary and minor incidental expenses. Those were taken from a day book——

Q. These have not been introduced in evidence, Mr. Evje, but these are the books I referred to in my opening statement as being in Court.

Will you proceed, please?

A. Yes. The other information, or summary, monthly summary was prepared from the check stubs and bank statement and cancelled checks and consisted of simply posting under suitable headings all deductible expenditures and any drawings that might have been made by Mr. Cohen. These in turn were posted to what Mr. Murton called a general ledger sheet maintained on columnar paper and were footed at the end of each month and proven across to tie into the total amount of recorded disbursements for the Kingston Club, based on purely business deductions.

(Testimony of Arnold W. Evje.)

In addition to that, each month, for the four months at least that I did the work, I reconciled the bank, merely taking again the balance, adding it to the total deposits for the month, subtracting the disbursements for the month and recording any outstanding deposits or checks with no regard as to whom paid or what for, or anything like that.

Q. Did you have any records of cash expenditures in addition to the ones shown by checks?

A. Yes; a daily—I shouldn't say a daily. I believe it [58] was a monthly sheet that was given, listing all of the expenditures for the month pertinent to either cash drawings, cash expenditures or checks. These were either attached with a rubber band or in some manner, with the bills that were paid, not necessarily all of the paid bills, but all of those for which Mr. Cohen had receipts. Those were basically the start for posting these expenses which were checked to the cancelled checks to the bank and to the check stubs.

Q. Did you have in your possession any original records of receipts? A. No, sir.

Q. Did the books which you referred to as the ledger, purport to cover receipts?

A. No; it did not.

Q. Could you tell us what further accounting procedures were carried on after those monthly postings were made?

A. The monthly postings, as I say, were re-capped with a running balance month by month, so that all of the items, the particular items of rent

(Testimony of Arnold W. Evje.)

or miscellaneous expense or newspapers totals for each of those categories would add to the total amount of expenditures as record in what, as I say, is called the general ledger.

Q. And was any disposition made of those at the end of the year? A. Of which? [59]

Q. This running account, was it brought to a culmination?

A. It was brought to a culmination in a summary of income and expense which was, I believe, presented to Mr. Calegari for income tax purposes.

Q. Are you familiar with Mr. Murton's handwriting? A. Reasonably.

Q. I will show you a sheet which is marked "Kingston Club, 1950," concerning which Mr. Calegari testified this morning, and ask you if that is in Mr. Murton's handwriting? A. Yes; it is.

Q. I have here two other sheets; one is marked "Kingston Club, December 31, 1948," and one marked "Kingston Club, December 31, 1949." I call your attention to the fact that on the 1948 sheet the word "cars" and "horses" appear. On the 1950 sheet the word "cars" and "events" appear.

Can you tell us what parts, if any, of the business were intended to be designated by those two words?

A. To the best of my knowledge, the category of "cards" concerned the operations emanating from this social club or the card games as such.

Q. And there were, as far as you know, complete records kept of the social club?

A. That is right.

(Testimony of Arnold W. Evje.)

Q. Or the card game. And at the time you did the work you took off the figures, both income and expense, from those [60] records each month?

A. I did.

Q. Referring to the ledger which you have before you concerning which you have just testified, are the amounts of expense which are set forth in these three statements derived from that ledger record which you have?

Mr. Nyquist: I object to the designation "the ledger record." The document has not been identified as the ledger or record. It looks to me like an accountant's work sheet. I think the document would be properly identified.

Mr. Sherwood: I will withdraw the question, your Honor. I believe Mr. Evje did say this is what they had for a ledger.

Q. (By Mr. Sherwood): Would you allow me to take that and have it marked for identification?

A. Yes.

The Clerk: Exhibit 9 for Identification.

(The document referred to was marked Petitioner's Exhibit 9 for Identification.)

Mr. Sherwood: The top sheet, 1951, we are not offering that. It just happened to be part of the books.

Mr. Nyquist: I would like to find out a little more about what this is before I agree to it. It seems to be a lot of work sheets. I would like to find

(Testimony of Arnold W. Evje.)

out who kept it and a [61] little more of the background of what this purports to be.

The Court: Do you object to Mr. Nyquist questioning the witness at this point?

Mr. Sherwood: No, your Honor.

Voir Dire Examination

By Mr. Nyquist:

Q. Did you prepare these sheets?

A. No; only four months or five months.

Q. And these sheets were maintained in Mr. Murton's office? A. Yes.

Q. Where have they been since then?

A. I don't know. I saw them a day or two ago in Mr. Lewis' office, but I don't know where they had been.

Q. You say you posted these sheets, made entries on these sheets for a period of a few months?

A. Five months in 1950 only.

Q. You made entries relating to expenses?

A. That is right.

Q. This purports to be merely a summary of expenditures?

A. That is right; only business expenditures in the sense that you and I think of them.

Q. And it was prepared from what information?

A. From a monthly summary sheet prepared by Mr. Cohen, supported by either paid bills or the actual cancelled checks [62] working into the check stubs in his check book.

(Testimony of Arnold W. Evje.)

Q. Do you have any of these monthly summary sheets? A. No; I do not.

Mr. Nyquist: Your Honor, we really haven't disallowed any of these expenditures. I am not too convinced about this but I don't think it is material enough to be worth objecting to. I will offer no objection.

The Court: Very well.

Mr. Sherwood: One other question.

Q. (By Mr. Sherwood): For the years in question here, the entries which are not in your handwriting are in Mr. Murton's handwriting, are they not?

A. For the years in question, that is right.

The Court: Very well; no objection. They will be received.

The Clerk: Exhibit 9.

(The document marked Exhibit 9 for Identification was received in evidence.)

The Court: As I understand it, the top sheet is not applicable here?

Mr. Sherwood: That is right; the top sheet applies to the year 1951 and is not applicable.

Mr. Nyquist: These were shown to us today for the first time. We have not had an opportunity to go through them [63] carefully and in stipulating to this it is my understanding that we are stipulating to a summary of the expenditures that were on the return and were allowed; is that the understanding, Mr. Sherwood?

(Testimony of Arnold W. Evje.)

The Court: You are stipulating it into the evidence; you are not admitting the truth, as I understand it, or, rather, you are not objecting to its coming into the evidence?

Mr. Nyquist: We are not objecting to its coming into the evidence based upon this assumption: We have had no opportunity to go through it and analyze it in detail. We are taking it upon the representation that it is a summary of the expenditures that were on the return.

Mr. Sherwood: That was the question, if you will recall, I asked and withdrew, because I did not have this foundation. I am going to ask the witness if the summaries are not taken from there. That is my understanding, yes.

The Court: Well, of course, I want you to ask this witness anything you want, but in order to expedite this case, since there is no objection, but since counsel hasn't had the opportunity to examine them, can't we receive it subject to check, with the understanding that respondent will be protected, if given the opportunity to show anything that isn't correct about it even though it might be necessary to reopen the case for it, not that I assume that, but if not, then I would like to have these papers turned over to respondent counsel so he [64] can have one of the agents examine or verify it in whatever way may be appropriate.

Mr. Nyquist: Let me put it this way: We have not disallowed any of the expenses claimed. If this document contains nothing but a list of the ex-

(Testimony of Arnold W. Evje.)

penses claimed, we have no objection. If there is some other information in there other than merely a list of the expenses claimed on the returns, we do not intend to stipulate to any such other information.

The Court: Is there anything in there that isn't an expense which has been allowed, as far as you know?

The Witness: No, your Honor.

Mr. Nyquist: Very well, your Honor.

The Court: On that assurance, as I understand it, you have no objection. If you find something seriously out of line on that I will have to consider it, if, as and when it is presented. I do think, Mr. Nyquist, that if you have somebody to do it, that ought to be done today.

Mr. Nyquist: I think, your Honor, that we ought to have had an opportunity long ago to do this.

The Court: Probably so but we are faced with the situation confronting us here and not what should have been.

Q. (By Mr. Sherwood): Along the line of the discussion that has just taken place, as far as you know, the expenses set forth in the three summary sheets which were furnished to Mr. Calegari, are the [65] same expenses as set forth in the exhibit that has just been admitted?

A. That is right.

Mr. Sherwood: If they are different, your Honor, we don't know about it.

Q. (By Mr. Sherwood): This summary sheet

(Testimony of Arnold W. Evje.)

also contains a statement, a profit and loss statement, and can you tell us the method used in arriving at the profit and loss shown on these summaries?

A. The method used to arrive at what we will say is net income was to take—we had already itemized all deductible expenses. We take the beginning bank balance and subtract it from the ending bank balance, adding to that any personal withdrawals, all of these expenses as itemized, and the difference between the beginning and the ending were these adjustments which would constitute gross income. From this would be deducted this summary as submitted in evidence here to arrive at net income from the operations of the Kingston Club.

Q. Did it take into account any sums of cash that might have been on hand in the Petitioner's possession?

A. As far as I know, it would only incidentally, with reference to a particular fund or revolving fund, but other than that I couldn't say, actually.

Q. The revolving fund was more or less a permanent account in the business, wasn't it? [66]

A. That is right.

Q. But you didn't show that on any of these statements? A. No, sir.

Q. Do you recall an audit of the years 1948 and 1949 conducted by Mr. R. Perenti? A. I do.

Q. And I will show you a copy of an exhibit which has already been admitted into evidence, and ask you if that is a copy of Mr. Perenti's report?

(Testimony of Arnold W. Evje.)

The Court: It has been admitted as such.

Mr. Sherwood: I want to ask him some questions, your Honor.

The Witness: To the best of my memory it is, yes.

Q. (By Mr. Sherwood): On the front page it says, "All information was received from Mr. A. Evje, Murton Audit Company's taxpayer's representative."

You are the one who discussed these matters with Mr. Perenti, were you? A. That is right.

Q. At the time you discussed these matters with Mr. Perenti were you still in Mr. Murton's office or had you left that office?

A. I am trying to remember the exact date of the audit, the time it came about. I don't know whether it was in 1950 or [67] 1951.

Q. How did you happen to discuss the matter with Mr. Perenti?

A. Mr. Cohen called me and informed me that he had been contacted for an audit of the years 1948 and 1949 and wondered if I would discuss the matter with the agent.

Q. That is the Petitioner in this case?

A. Yes.

Q. And Mr. Murton at that time was ill?

A. That is right; if it was in '50, which I believe it was, he was ill.

Q. As I understand it the report was dated January, 1951. Mr. Perenti says it was in 1950; does that accord with your memory?

(Testimony of Arnold W. Evje.)

A. I was still with Mr. Murton then.

Q. Was Mr. Murton in the office at that time?

A. No.

Q. Do you know approximately when Mr. Murton died?

A. I believe about the middle of the year, 1951.

Q. At the time you held these conferences with Mr. Perenti, were these records which are admitted in evidence as Petitioner's Exhibit No. 8 available for his examination?

A. You mean the basic data from which those were prepared?

Q. Yes. [68] A. Yes.

Q. At that time were the bank statements and bank checks for the two years, 1948 and 1949, available? A. Yes.

Q. Did Mr. Perenti have access to those?

A. Yes.

Q. Did you succeed to Mr. Murton's business upon his death? A. No.

Q. Do you know what happened to the bank checks and bank statements for the years 1948, 1949? A. No.

Q. Have you made any effort to locate them?

A. I have. I tried contacting both the widow, Mrs. Murton, and also Mendelson and Ker, whom I believe are the successors to Mr. Murton's practice.

Q. Have you been able to locate any of them?

A. No; I have not.

Q. Referring to this memorandum of cash ex-

(Testimony of Arnold W. Evje.)

penditures to which you said were usually attached to pay bills with a rubber band, or something of that sort, do you know what became of them?

A. I do not.

Q. Where did you last see them?

A. Well, at the time I was working on them, as I say, [69] there were four or five months involved, and those I believe I brought back to Mr. Murton's office, and left there with the Kingston Club working papers.

Q. These working papers or ledgers, whatever you call it, marked Petitioner's Exhibit 8, was that kept at the Kingston Club? A. No.

Q. Where was it kept?

A. At Mr. Murton's office.

Q. Outside of these records of the cardroom which Mr. Wright kept, were any of the other records of the Kingston Club or of the commission business kept at the Kingston Club?

Mr. Nyquist: Object, your Honor. This witness was not working at the Kingston Club. There has been no showing that he would have knowledge of what records were kept at the Kingston Club.

Mr. Sherwood: I can ask him that.

Q. (By Mr. Sherwood): You did go to the Kingston Club, did you? A. I did.

Q. What did you do there?

A. I did the work that I have previously described, itemizing these particular deductions and reconciling the bank and then taking the papers

(Testimony of Arnold W. Evje.)

regarding the expenditures and our own work papers back to Mr. Murton's office. [70]

Q. Were those papers then retained at his office?

A. To the best of my knowledge, yes.

Q. During the period which you had them?

A. Yes.

Q. And did you follow the same method on that that Mr. Murton had been following prior to his illness? A. That I did.

Q. You have in front of you some other papers. Are they part of the Kingston Club documents?

A. Yes.

Q. Could you tell us what they are?

A. These are the first papers I described, taken from the gray books, the records of the cardroom itself, and the bank reconciliation for the five months involved in which I was up there doing the work.

Q. That is all the material in those papers summarized and set forth in Petitioner's Exhibit No. 8?

A. That is right.

Mr. Sherwood: You may cross-examine.

Cross-Examination

By Mr. Nyquist:

Q. Did you ever see any betting records?

A. No; I did not.

Q. Did you ever see any record of cash receipts?

A. No; I did not. [71]

(Testimony of Arnold W. Evje.)

Q. Was your method of computing income based entirely upon the receipts that went into the bank?

A. To the best of my knowledge, yes, it would be.

Mr. Nyquist: No further questions.

(Witness excused.)

Mr. Sherwood: We will call Mr. Lesly Cohen now, your Honor.

Whereupon,

LESLY COHEN

the Petitioner herein, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please, for the record and your address.

The Witness: Lesly Cohen, 471-12th Avenue, San Francisco. My Las Vegas address, if necessary, is New Frontier Hotel.

Mr. Nyquist: May I ask the witness to speak a little louder, please?

The Witness: Yes, sir. Did you hear my last answer?

Mr. Nyquist: I hear you now, yes.

Direct Examination

By Mr. Sherwood:

Q. You are the Petitioner in this matter?

A. Yes.

Q. During the years 1948, 1949 and 1950, where did you [72] reside?

(Testimony of Lesly Cohen.)

A. I resided with my brothers and sisters at 471-12th Avenue, San Francisco.

Q. And how long had you resided there?

A. Up until I left San Francisco; for approximately thirty years.

Q. You were born and raised here in San Francisco? A. Yes, sir.

Q. Went to the schools in San Francisco?

A. Correct.

Q. And I take it by that fact you had a rather large acquaintanceship in San Francisco?

A. I believe so.

Q. Just briefly, will you tell us what your original occupation was in San Francisco?

A. Well, after leaving high school I went to work on the newspaper as a copy boy, and I grew up in the newspaper business.

Q. And what department of the newspaper business were you in? A. Sports department.

Q. What did you do in that connection?

A. I covered sports in general, primarily boxing and baseball.

Q. And how long did you continue on the sports staff of the Bulletin? [73]

A. I worked on the Call-Bulletin, or on the Bulletin until it was disposed of to the Call; I believe it was in 1934 or '35.

Q. What did you do after that?

A. I did freelance work and edited a couple boxing magazines, publicity work for boxing clubs, in and around San Francisco.

(Testimony of Lesly Cohen.)

Q. Then what did you do?

A. I was called into the Army.

Q. And upon your discharge from the Army what did you do?

A. After that I returned to San Francisco and after a brief period I met Mr. Coplin who was operating the Kingston Club.

Q. Will you state what you did with Mr. Coplin?

A. Mr. Coplin invited me into his business. At that time he was running a horse race commission business and he felt with my knowledge and background I could help his business to expand into sporting events. He invited me to join him as a limited partner, which I did, and which continued until his death in late 1947.

Q. During the time that you were associated with Mr. Coplin did business happen to come under an accountant?

A. I believe Mr. Murton was the accountant for the business. [74]

A. I believe Mr. Murton—was he the accountant when you first went there?

A. To the best of my knowledge, yes.

Q. How long did he remain accountant for the Kingston Club?

A. He continued with Mr. Coplin and remained with me until his death.

Q. When did you commence operation of the Kingston Club as sole proprietor?

A. Approximately January, 1948.

Q. And how long did that continue?

(Testimony of Lesly Cohen.)

A. Until the Stamp Tax was enforced; I believe that was the latter part of 1951.

Q. Did Mr. Murton continue all through the period that you were there as accountant?

A. Yes, sir.

Q. Prior to the time that you were associated with the Kingston Club, did you avail yourself of the services of an accountant?

A. I believe Mr. Calegari handled my affairs.

Q. That is Mr. Calegari, certified public accountant who testified this morning?

A. That is right.

Q. What did Mr. Calegari do for you; what services did he render? [75]

A. Computed my affairs for the year and reported my tax, put them together.

Q. Did he have access to your records of your investments? A. Yes, sir.

Q. Were you in a partnership with your brother? A. I was.

Q. What was the nature of that business?

A. It was a partnership in the stock account.

Q. And did Mr. Calegari have anything to do with that?

A. He was the auditor for both my brother and myself.

Q. Did that go back to the time prior to your going into the Kingston Club? A. Yes, sir.

Q. Who filed your income tax returns prior to the time that you went into the Kingston Club?

A. Mr. Calegari.

(Testimony of Lesly Cohen.)

Q. In other words, he always continued to file your tax returns? A. That is right.

Q. Did you give any instruction as to where he would get the information as to your Kingston Club business for the purpose of filing your income tax returns?

A. That was usually mailed to him by Mr. Murton.

Q. How did Mr. Murton happen to do that? [76]

A. By my instructions.

Q. Did Mr. Murton give you annual statements of the business of the Kingston Club?

A. Yes; he gave me a copy, too.

Q. I will show you three documents concerning which you heard Mr. Calegari testify this morning, and ask you if they are the annual statements furnished to Mr. Calegari by Mr. Murton at your request covering the calendar years 1948, 1949 and 1950? A. That is right.

Mr. Sherwood: At this time, your Honor, I would like to offer these sheets in evidence; 1948 sheet being the exhibit next in order; the 1949 next and 1950 next.

Mr. Nyquist: I renew my objection, your Honor. We have had a very good foundation laid for some of the expenses shown there which are not in dispute. With respect to the income items, that is not a summary from any books and records, merely an income account based on some sort of computation he made, based on bank balances or something. It is

(Testimony of Lesly Cohen.)

not a summary. There has been no proper foundation laid for the income portion of these statements.

Mr. Sherwood: If the Court please, we have laid what foundation there is. I think the objection goes to the weight and not to the admissibility. This is what we have and this is what was used, and if the government wants to attack the [77] sufficiency, and we have brought out here that it does not purport to include cash, which the witness will have to testify to orally, but this is what documentation there is. It was made at the time and actually used by the accountant who testified this morning that he used them.

At that time the objection was that they were not identified. Now the witness says that he had them sent to Mr. Calegari for that purpose and that he got copies of them annually.

The Court: What does that add to it?

Mr. Sherwood: Shows those were current records made by some man now deceased, and whom we can't get here, but Mr. Evje has told us the way he arrived at it.

The Court: It doesn't show the basis for them any more than was in there before.

Mr. Nyquist: I think the record is a little more complete now, your Honor, in that it definitely shows that the man who prepared them didn't have the basis for showing the income of the business, that he didn't have any income records.

Mr. Sherwood: In any event, aren't we entitled to have the record show how the man made his re-

(Testimony of Lesly Cohen.)

returns? Maybe he didn't make them correctly, but he made them.

The Court: Mr. Sherwood, if these are offered not as to the facts contained therein, but merely to show on what basis the returns were made, which might possibly—although I [78] don't see clearly how—might possibly reflect on the question of intent with respect to the fraud issue; they are offered solely to show how the returns were prepared and limited to that, I don't see any particular objection to them.

I don't gather, however, that you offer them solely for that purpose. You offer them to show, among other things, income. I don't understand that the deductions that are in dispute—

Mr. Sherwood: Counsel has said they are not in dispute.

The Court: What I can't see so far is how they are in any way proof of income. They may be evidence of the mere calculation, the details of which I don't recall too well, but which was to take cash at the end of the year, deduct cash at the beginning of the year, broadly speaking, and consider the difference between the two as gross income, and make certain other adjustments, and then deduct these various items of expense.

I am not tempted to try to repeat that fully. It may picture on paper the results of that calculation. What have you to say with respect to that, Mr. Nyquist?

Mr. Nyquist: This calculation, your Honor, is

(Testimony of Lesly Cohen.)

based on, apparently, not on any records. The man who made the calculation had no information as to the receipts or bets; it was based solely on what went into the bank, and in the absence [79] of information that all the income went into the bank, it certainly shows that the man who made that computation didn't have the necessary information to determine the receipts.

The Court: Well, Mr. Nyquist, I don't understand that you raise any question about the fact that he had the bank statements available, and whether or not his calculation was correct, that it was taken from the bank statement—

Mr. Nyquist: So far as what went into the bank is concerned, that is already stipulated, your Honor.

Mr. Sherwood: I don't believe that is quite true. If it is, why that is all we need, but I want to get in—

The Court: How about taking a look?

Mr. Sherwood: I want to get into the record, if I can, a substitute for the missing bank statements, which I just can't produce.

The Court: How about you and Mr. Nyquist getting together with the stipulation, which is right here, to see whether those figures are or are not in it?

Mr. Sherwood: They are not in the stipulation.

The Court: I understood you to suggest otherwise, Mr. Nyquist.

Mr. Nyquist: Well, I understood he was merely

(Testimony of Lesly Cohen.)

trying to show what went into the bank. In Paragraph 5 of the stipulation:

“Total deposits, Petitioner’s commercial account in the [80] Market-Ellis Branch of the Anglo-California National Bank for each of the years 1948, 1949 and 1950, were in the following amounts:

“1948, \$508,000; 1949, \$404,000; 1950, \$283,000.”

Those are round figures. In the preceding paragraph, it says:

“Throughout the years 1948, 1949 and 1950, the Petitioner maintained this commercial account and attached is Exhibit 5-E, a summary of the deposits to said account during the said years prepared from the deposit slips on file with the bank, except for the month of November, 1949, for which there were no deposit slips that could be located.”

The Court: Does that satisfy you, Mr. Sherwood?

Mr. Sherwood: To the extent that those things are shown by years in the stipulation, but I still think that there is evidentiary value in the papers, and I am quite aware of the various objections that can be urged, and the one your Honor has voiced, but there is still some evidence of the facts which we are unable to produce definitely because Mr. Murton is dead.

The Court: Well, gentlemen, as I view this, there is no objection to this statement with respect to the expense item. As far as the income item is concerned, it reflects the witness’—not this witness but a former witness’ calculation from beginning

(Testimony of Lesly Cohen.)

and ending bank statements, beginning and ending of each year, with the other factors described in the testimony. [81]

It is certainly not evidence that that was all of this taxpayer's income because the witness frankly said he didn't know anything about cash, and I don't know whether that is or is going to be an issue in the case, but as a summary of the analysis made of income by comparison of bank statements, I think it is probably properly receivable. Otherwise the facts in here don't seem to be disputed. When I say "receivable," I am talking about admitting it into evidence. I am not talking about the weight.

There are many things that could be suggested adversely with respect to the weight of testimony, income on that basis. I think it probably does have some evidentiary value in that respect, taken in connection with the stipulation and with the testimony. I am by no means certain in that view, however, but I think it is better to have it in the evidence than out, and I will admit it subject to objection, motion to strike and argument in the brief; if I am convinced at that time that it is not admissible I am going to strike it.

I want to emphasize that to you particularly, Mr. Sherwood, so that you will not assume that I have made any final decision admitting this into evidence. If you have any further means of authenticating it or verifying it, or otherwise supporting your position, I am telling you here and now to go

(Testimony of Lesly Cohen.)

ahead with it, because there is quite a possibility that on argument and analysis I may strike it, but as well as I can see [82] and without taking far more time than would be appropriate, and incidentally, without hearing the argument of counsel and authorities on it, I can't make a final disposition of it at the moment.

If I rule it out, there will be an offer of proof and it will be there anyhow except that it would be useless, if I ultimately determine that it should be in. If I let it in, it will be there for whatever value it may have; also giving me the opportunity on motion to strike, and argument in the brief, to strike it out. But the onus is still on you, Mr. Sherwood, to the extent that you deem appropriate to support this evidence and authenticate it, in whatever way you think proper.

However, I will admit the three sheets subject to the qualifications that I have mentioned.

Mr. Nyquist: In line with your Honor's suggestion, so there can be no mistake as to the nature of our objection, I wish to make them clear to Mr. Sherwood at this time.

The Court: Yes.

Mr. Nyquist: That we are objecting to this for the reason that it is not a summary by the accountant of some books and records which are now missing, but it is conclusions by the accountant in which he used apparently two known figures to start with, opening bank balance and closing bank balance, and to that he applied a lot of judgment of

(Testimony of Lesly Cohen.)

his own in [83] determining adjustments by way of personal——

The Court: Mr. Nyquist, I am inclined to agree with you on that. It seems to me that the purpose of this statement is, one, for whatever it's worth to determine how the income tax returns were made up; you claim they are wrong anyhow.

No. 2, it summarizes on a sheet of paper, and implements what the witness testified to as far as how he calculated the income. Personally, I think it would be just as much help if we had the figures that were in the stipulation and argument in the brief which analyzed these facts, but it doesn't seem to me that allowing it in the evidence adds a great deal to that except that it is in a convenient form of summary.

Mr. Nyquist: I agree with your Honor. If the witness merely said Exhibit C and the return reflected those same conclusions, it would have said the same thing; putting in an additional document instead of the return I don't think adds any weight to the case.

The Court: Again to make it finally clear, I am admitting, subject to objection, motion to strike and argument on the briefs.

Mr. Sherwood: Thank you, your Honor. We will do our best with the testimony that we have to give further authentication. Of course, we will not lay down just because [84] your Honor admitted it provisionally.

(Testimony of Lesly Cohen.)

The Court: You understand that my comments have nothing to do with the question of weight?

Mr. Sherwood: That is right.

Q. (By Mr. Sherwood): Will you state, Mr. Cohen, what types of business you conducted at the Kingston Club in 1948, 1949 and 1950?

A. Kingston Club proper was operated as a card room, separate from the commission business which included horseracing and sports events. The basis for the horseracing and sports events was the commission business and the maximum commission on any event or any transaction was five per cent.

Q. Five per cent of the entire wager?

A. That is right.

The Court: That is both winning and losing amounts?

The Witness: That is right, your Honor. May I amend that, your Honor? In horseracing it was only on the basis of a losing transaction on the part of the bettor.

The Court: Not being an expert, maybe you better elaborate on that a little bit. I don't quite follow you on that.

The Witness: All right. Your Honor, in the case of a horserace transaction, the better places X dollars on a particular race, and if that horse loses, why, the five per cent maximum percentage is taken. On the other hand, if the [85] bettor wins, there isn't any commission.

The Court: All right.

Q. (By Mr. Sherwood): There was some discussion this morning about the difference between

(Testimony of Lesly Cohen.)

bookmaking and commission betting. I wonder if you could clear that up for us.

A. Well, my theory is that a bookmaker is one who accepts wagers and risks his own money on the result of the event. A commissioner accepts commitments and tries to fill them and he operates solely on the commission basis.

Q. Did you have occasion to bet yourself, or carry these bets?

A. I wasn't in business for that purpose.

Q. Did you ever do it?

A. Purely by accident.

Q. What sort of arrangement might present itself where you would do that?

A. Sometimes I misplaced my confidence in placing wagers, and I was stuck with them.

Q. Perhaps you could explain that a little more clearly. I think I know what you mean but I have heard you talk about it before.

A. On rare occasions I was forced to keep wagers that I had no intention at the time I received them, or made commitments to keep. I intended to dispose of them but for some [86] unforeseen reason I couldn't do it.

Q. Would you ever make financial concessions in order to dispose of them?

A. Oh, yes, naturally I had to.

Q. How did you do that?

A. There were many cases where I would have to dispose of these wagers the best way I knew how.

(Testimony of Lesly Cohen.)

In that case I turned them over to other commissioners. We would either split the commission, or in some cases I would waive my entire commission.

The Court: You don't make yourself altogether clear to me, Mr. Cohen. I understand the last part of what you said, but under those situations, which as far as I can gather you have indicated you might have to make good, was that due to the fact that after you had taken a bet as a betting commissioner, normally speaking, you would get somebody to take the other side of that bet, maybe at different odds, but sometimes you couldn't get anybody to take the bet, or the person that you got to take the bet didn't pay up and that you had to make good the full amount of the winnings of the person who placed the bet with you; is that right, and if not what is the situation?

The Witness: No; that is not correct, your Honor. The thought is that at times on rare occasions I would take a commitment and probably a profit and not be able to dispose of [87] it.

Q. (By the Court): What do you mean by "dispose of it"?

A. Either turn it over to another person who would accept it or give it to another broker.

Q. You in some way have to get both sides of a bet, or get somebody else to take the other side?

A. That is right; that is the basis of the business.

Q. Can't we get right down to A and B? A comes to you and wants to place a bet, we will say,

(Testimony of Lesly Cohen.)

on the world series, at whatever odds you are quoting as betting commissioner. He places that bet with you. Does that mean he puts up the money for his bet or do you trust him or is it sometimes one and sometimes the other?

A. Mine was perhaps 100 per cent credit business.

Q. He placed the bet, and he potentially owed, if he lost? I mean he would have to make good on his bet? That is A. After that bet was placed with you, what did you do about it to dispose of it, as you say, or balance it off, or whatever technique you used?

A. Normally the bet wasn't placed until it was filled, until the other side was taken care of, but there were occasions when I miscalculated and I was forced to hold the bet.

Q. Do you mean by that that you assured A that his bet was placed and you couldn't find somebody to take the other [88] side, or what?

A. Well, it amounted to that but that is not the actual fact.

Q. How about giving me the actual facts; I am trying to get them.

A. Usually an emergency arose whereby I couldn't reach anybody to dispose of it, whether it be on a commission basis or just to trade it off to somebody.

Q. Well, for practical purposes, at that point—I am not placing any emphasis on the word “book-maker” but I don't know any other word to use—but

(Testimony of Lesly Cohen.)

at the moment when somebody placed a bet with you, A placed a bet with you and you could not dispose of it, you then for all practical purposes became a bookmaker with respect to that one bet?

A. That is right.

The Court: Please, Mr. Nyquist, don't let my artificial use of the word "bookmaker" crop up in any brief or argument. I am just trying to understand it, this process; that was not supposed to be an admission that this man was a bookmaker at any time. The testimony is, up to the moment at least, entirely limited to his activities as a betting commissioner, and he and I are both trying to get that through my skull. That is as far as we have gone on it.

All right.

Q. (By Mr. Sherwood): To carry out the illustration a little further, Mr. Cohen, as I understand it, if A calls you up on the telephone, and said, "I want to bet \$100 on the world series," normally you did not take the bet at that time; is that correct or not? A. That is right.

Q. What did you do?

A. I would place it on file and try to find somebody to fill it.

Q. And suppose you did find somebody who was willing to bet \$100, what would you do?

A. If I did not?

Q. If you did.

A. If I did, then—then A would call me for confirmation.

(Testimony of Lesly Cohen.)

Q. A would call you back for confirmation?

A. That is right.

Q. And what would you do then?

A. The bet was placed.

Q. If you had found——

A. A and B, they get together.

Q. That was the normal operation?

A. That is the normal operation.

The Court: What happened when you couldn't get someone in B's position? [90]

The Witness: That is the reason for all these large checks, your Honor. I would have to go afield and distribute them as best I knew how.

The Court: You see, Mr. Cohen, you have to recognize you know a lot more about the betting commissioner business than I do, and yet I am going to have to understand this if I am to give you a fair result.

The Witness: I am trying to——

The Court: Sometimes you got B without any trouble. Sometimes you had to, you might say, go to some group of B professionals, we will call them, and place your bet and lose some of your commission, but other times in some manner or other, you seem to have confirmed bets to A and not be able to find anybody to take them, is that right?

The Witness: No; that is not right, your Honor.

The Court: That situation never happened?

The Witness: Where I confirmed a bet without placing it, is that what you are saying?

(Testimony of Lesly Cohen.)

The Court: Where in some manner you became responsible for the bet and couldn't find someone as a counterpart.

The Witness: That came up once in awhile, yes, sir, that is right.

The Court: You would then, in essence, be betting on the other side on that occasion?

The Witness: That is right. [91]

The Court: What circumstances would result in your confirming a bet where you had to take over in that way?

The Witness: Well, the time element mainly. Some individual would call me right on top of an event and possibly he couldn't reach me back and I would feel that I could dispose of it for him.

The Court: In your experience at times you took them on thinking you could dispose of the bet and then couldn't when the time came?

The Witness: That is right.

The Court: The bets you were unable to dispose of were generally emergencies or you couldn't contact someone in time? Were those bets as a rule desirable bets?

The Witness: There wasn't any such thing as a desirable bet for me.

The Court: You just didn't desire to bet at all?

The Witness: If I did I wouldn't wait for somebody to bet me. I would bet myself.

The Court: Going back to these bets, were they desirable or undesirable?

(Testimony of Lesly Cohen.)

The Witness: Undesirable.

The Court: Would they be more apt to lose or win?

The Witness: That is hard to judge. I imagine they balance themselves out.

The Court: Let's not be too loose with that word "desirable." [92]

A desirable bet was where he got his full commission and took no risk; a somewhat less desirable one was when he took a bet and had to replace it or make an arrangement in which he either split his commission or lost his commission, but didn't have any risk, and the third, and the type that was most unsatisfactory, was when on occasion he was forced into taking a risk that he didn't want to take; is that right?

The Witness: That is right, your Honor.

Q. (By Mr. Sherwood): In San Francisco, were bets paid in cash or by check or by any other means?

A. The common practice, as far as I am concerned, was by cash.

Q. Was that the common practice among other commissioners in San Francisco?

A. Among them or with them, the commissioners?

Q. Yes, among.

A. Among the commissioners it is always by cash.

Q. By that; you mean where you traded with them or laid off a bet with them, that was a cash

(Testimony of Lesly Cohen.)

transaction? A. That is right.

Q. In the stipulation which is on file, there are a number of checks which you would endorse which came from cities all around the country. Could you tell us how you happened to have transactions of that nature? [93]

A. Well, those were transactions that were either placed with me by those individuals or which I placed with them, and we carried on a day to day business, so to speak, and our only means of paying and collecting was by check.

Q. And how did you conduct the actual transactions with them? A. By telephone.

Q. And did you have any particular custom of settling?

A. Various ways of settling. That is, as far as time was concerned. Some were financial agreements; others were weekly, monthly, some were daily.

Q. Normally, however, as I understand it, the bets in San Francisco were generally paid in cash?

A. Positively.

Q. And referring to the number of checks which you cashed in San Francisco as shown by the stipulation on file, what would become of the money that you received?

A. Well, I carried a revolving fund in the office to meet current obligations in a betting sense, and if it ever grew too high I would put it in the bank, and usually there were a lot of checks cashed by me

(Testimony of Lesly Cohen.)

in the office with no transaction; just persons asked me to cash checks.

Q. I am referring now more specifically to these checks from out of town points.

A. Out of town checks were usually deposited, unless, of [94] course I needed ready cash to meet my local obligations.

Q. For instance, if a man in San Francisco bet a thousand dollars, and you turned that bet over to a commissioner, say in Omaha, you would need the money from the man in Omaha to pay the obligation to the winner in San Francisco, if he won?

A. That is right.

Q. What would happen if this revolving fund reached more than the usual amount; you didn't have any current obligations to pay with it?

A. If it was a matter of a few hundred dollars, I didn't do anything about it. If it ran into sizeable figures, I usually put it in the bank.

Q. Did the cash which you had on hand at the beginning of 1948 and the end of 1948 show any material difference? A. No.

Q. By "material," I mean a difference of more than a few hundred dollars?

A. I would say no.

Q. Did the difference of cash include—which you had on hand at the beginning of 1949 and at the end of 1949 show any material variance?

A. No; I always kept it around the same level.

Q. And your answer would be the same for 1950? A. That is right. [95]

(Testimony of Lesly Cohen.)

Q. Are you generally familiar with the method which Mr. Murton used in arriving at your income?

A. Well, at the outset when I took over——

Q. You can answer that yes or no first, and I will ask you more questions about it.

A. Yes, sir.

Q. And did you ever discuss the adequacy of the method with Mr. Murton?

A. That was the first thing I did when I took over the business.

Q. And will you state what that conversation was?

A. He assured me that he had a letter from the local——

Mr. Nyquist: Objection, your Honor. I move that be stricken so far as it relates to a statement that Mr. Murton made about having a letter.

The Court: What is the basis of your objection, Mr. Nyquist?

Mr. Nyquist: The objection is that Mr. Murton's statement that he had a letter is hearsay.

The Court: Well, of course, it's hearsay but isn't it an exception to the hearsay rule? I would be glad to hear from both counsel. I don't mean for one minute that that statement is admitted generally, the statement that he is apparently going to make, is to be admitted generally for proving the fact of any government ruling or that the method was or wasn't [96] accurate, but this man is charged with fraud, as well as substantially additional taxes, and doesn't it reflect upon his intent as to the type of

(Testimony of Lesly Cohen.)

advice he had with respect to the preparing of his income tax returns, and isn't it discussion along those lines, with an accountant, isn't that in the nature of a verbal act on his part consistent with the business?

Mr. Nyquist: I will agree with your Honor's point there, yes.

The Court: Have you anything to add to this argument, Mr. Sherwood

Mr. Sherwood: I think your Honor hit the point. It doesn't prove the truth of whatever the fact may have been. We are trying to prove the man said it and it was part of the witness' state of mind.

The Court: And the witness relied on it?

Mr. Sherwood: Yes.

The Court: For that limited purpose, I am satisfied to admit it.

Q. (By Mr. Sherwood): Will you state the conversation? A. Will you repeat the question?

Q. Will you state the conversation that you had with Mr. Murton with respect to the method of accounting which he used to show your income?

A. At the time I took over the business from the late [97] Mr. Coplin, I met with Mr. Murton and asked his method of bookkeeping, if it were approved by the Internal Revenue office. He assured me that he had a letter from the San Francisco office of the Internal Revenue Service that his method was approved, and that it was the same method that he used during the years he acted as accountant for Mr. Coplin.

Q. Did anyone ever tell you that your method

(Testimony of Lesly Cohen.)

of accounting was not adequate to reflect your income prior to the inception of this case?

A. Nobody discussed it with me.

Q. You were in the Kingston Club when Mr. Perenti was conducting this audit and speaking to Mr. Evje?

A. Mr. Evje and Perenti were in Mr. Evje's office, I believe.

Q. Did you ask Mr. Evje to conduct the audit with Mr. Perenti? A. Yes; I did.

Q. Mr. Murton, I believe, at that time was too ill to do so?

A. I don't know the circumstances, but Mr. Evje conducted the audit with Mr. Perenti.

Q. At that time did anyone ever object to the type of record that you had?

A. Not to my knowledge.

Q. At that time your bank account and checks were [98] available? A. Yes, sir.

Q. I will show you Petitioner's Exhibit 7 for Identification and ask you if you have seen that before? A. Yes; I have.

Q. Under what circumstances did you see it?

A. It was shown to me by Mr. Calegari for the first time at a meeting with the agents, Messrs. Adrian and Dougherty.

Q. And have you gone over the various pages of that report with Mr. Calegari?

A. Yes; I scanned them.

Q. I call your attention to Exhibit A, which is

(Testimony of Lesly Cohen.)

entitled, "Lesly Cohen Summary of Net Worth, January 1, 1948-December 1, 1950."

Have you seen that summary before?

A. Yes.

Q. And have you discussed the contents with Mr. Calegari?

A. No; I can't say that I went into any discussion with him on it. I just accepted the findings.

Q. Have you looked at the other exhibits?

A. I went through them, yes.

Q. For instance, here is a list of property set forth there; is that a complete list of your assets?

A. That is right.

Q. Do you have any securities or bonds or real or [99] personal property of any kind, or I should say, did you have during the period here involved, '48, '49 and 1950 which is not set forth hereon?

A. No, sir.

Q. As far as you know, is this a full and complete statement of your assets for those years?

A. Yes, sir.

Q. And does this take into account the \$3,000 revolving fund?

A. No; there is no record of the \$3,000 revolving fund.

Q. It does not include that? A. No, sir.

Q. And with the exception of the \$3,000, or approximately \$3,000 revolving fund in cash, does this Exhibit A correctly reflect your net worth in each of the three years set forth on it?

A. Yes, sir; to the best of my knowledge.

(Testimony of Lesly Cohen.)

Mr. Sherwood: I think, your Honor, the exhibit should be admitted in toto.

The Court: Mr. Nyquist?

Mr. Nyquist: I don't think there has been a great deal added. Which other pages do you wish to offer?

Mr. Sherwood: The entire report, which is a net worth report; all of the schedules except Exhibit A are here in support of the net worth as worked out. The accountant has [100] various comments which are related by their terms to various schedules. For instance, on this page there is an explanation of B-7; here is an explanation of B-8, and so on.

The Court: Let me see Schedule A a minute.

I will hear from you, Mr. Nyquist.

Mr. Nyquist: As far as Exhibit A is concerned, that isn't a schedule of anything. It just contains some figures that the accountant admitted were more or less plugged figures to make the thing balance. The net worth figures, for what they are, are over in Exhibit B. I don't see that Exhibit A amounts to anything, other than to plug figures that the accountant put in to balance, and that is all it has been stated is, "Personal expenses to balance." I don't see that Exhibit A is admissible for any purpose.

Mr. Sherwood: I wouldn't call them a plugged figure. You have to have a balancing figure, as I understand it.

The Court: Plugged in the sense that it is char-

(Testimony of Lesly Cohen.)

acterized, which is Mr. Nyquist's objection, as far as I can see. But let's dispose of Exhibit A. Is Exhibit A any more than an analysis of a set of figures which you could put in your brief, figures that are otherwise established? Why is that evidence?

Mr. Sherwood: Well, at least it is an illustrative exhibit which summarizes in convenient form the matters which we will wish to discuss in our brief, and it is part of the [101] accountant's report. I think to some extent it is a little misleading and unfair to the accountant to tear his report up into sections. That report, in my opinion, is a very beautiful job. It is all tied in very well. If you take out one part, it isn't going to make much sense, and I think that it should be admitted for the general purpose that we have, and, of course, the weight is something entirely different.

We know your Honor has already expressed a statement to the other exhibits which have been admitted, which, of course, are repeated in here.

The Court: Other than Exhibit A, what are the exhibits that are in issue?

Mr. Nyquist: Exhibit B; that is a balance sheet. I don't know whether it is being offered as something an accountant prepared and submitted to Mr. Cohen, or the other way around. That isn't entirely clear to me.

The Court: Maybe I have this exhibit confused with some other, but is this the one where you agreed—this isn't the one where you agreed to put in B-1, B-2, B-3, and so forth, is it?

(Testimony of Lesly Cohen.)

Mr. Nyquist: Those are supporting schedules for certain groups of assets that we agreed.

Mr. Sherwood: He agreed to all of them, Exhibit 7-B, which is entitled, "Net Worth, Kingston Club."

The Court: Are any of the C schedules left out other than C-1? [102]

I think there was an objection to C-1, wasn't there?

Mr. Nyquist: Exhibit C was not, but B-1 was.

The Court: You are objecting to Exhibit A, Exhibit B?

Mr. Nyquist: Exhibit C.

The Court: Anything else?

Mr. Nyquist: One schedule back here; Exhibit B-7, I think it was.

The Court: And C-1; is that right?

Mr. Sherwood: I can't seem to find C-1.

The Court: I have it here. Summary of income and expenses of the Kingston Club.

Mr. Sherwood: That is right.

Mr. Nyquist: That is correct, your Honor; those are the ones we object to.

The Court: That is A, B, C, B-7 and C-1?

Mr. Nyquist: That is right.

The Court: I think this is a good time to take our recess and give you gentlemen a chance at the same time to go over these statements. However, I am not as familiar with this as you are. Where is the statement that this witness said he went over which shows all of his assets?

Mr. Sherwood: Those are the ones, outside of

(Testimony of Lesly Cohen.)

the one on the Kingston Club; they are all already admitted in evidence, but, of course, that B-7 is the one that—— [103]

The Court: Well, this witness went down the line with some assets, including securities and what not, and said that those were all of the assets?

Mr. Sherwood: That is right.

The Court: What schedule is that?

Mr. Nyquist: Is that Exhibit B?

Mr. Sherwood: Yes; I think so.

The Court: The reason I am asking about these, I am not going to take any more testimony until after the recess, but how this witness can glance down these items—for instance, look at the words, “Stocks (Schedule B-2),” and some figures, and say those are all of his stocks, I don’t quite see.

It does refer to Schedule B-2, which I am understanding is admitted, or has been admitted without objection, so that I suppose that would take care of the stock item at any rate. But in all events, I want to be prepared to hear Mr. Nyquist’s objection and any argument you may have with respect to Schedules A, B, C, B-7 and C-1, which, as I understand it, are the only schedules left out at the moment.

We better suspend for twenty minutes, until 4:00 o’clock. If anybody thinks that is too long, I will be glad to cut it down.

Mr. Sherwood: I think ten minutes is probably long enough. We have tried for a month to get together on this.

(Testimony of Lesly Cohen.)

The Court: When you are ready, then, gentlemen, not [104] later than 4:00 o'clock, notify the clerk and he will notify me and I will come in.

(Short recess taken.)

The Court: Proceed.

Mr. Sherwood: I think the comments of the accountant which were actually explanations of how he arrived at it were necessary for the understanding of it; of course, the Court understands, and we all understand, that is not evidence. The evidence is already in the record in large part. This is a summary and a very convenient method of summarizing the entire net worth of the Petitioner. The individual schedules have had supporting proof in each case, insofar as such proof is ascertainable.

In addition to that we have established the method the accountant used in arriving at the income figures by simply stating what he did, and it is in testimony and very simple. He took the bank balances, took the difference between them, all of the expenses which he could find deductible or not deductible, all the withdrawals and called all these together the gross income.

The witness has testified that while cash was not taken into account, it was a fairly constant figure which would not have varied more than a few hundred dollars. I think any objection to that goes to the credibility and not to its relevance. [105]

Mr. Nyquist: Of course, your Honor, this is a very fine and dignified looking accounting report,

(Testimony of Lesly Cohen.)

and I am afraid if it is admitted in toto, it will apparently given weight in proportion to its appearance rather than in proportion to its soundness, of the assumptions and suppositions and hypotheses upon which it is based.

Mr. Sherwood: There is nothing, from the comments of the Court today, that would lead me to believe he had fallen into that error.

The Court: The court hadn't thought he had fallen into it at the moment, but I can see Mr. Nyquist's concern about it. I see no substitution for going over this page by page and discussing it, if necessary.

On Page 1, about the only thing that I see that could be any possible objection to it is the second sentence, and part of the sentence following it, up to a colon, in which the statement is made, that "Your instructions were to submit financial statements," and so forth, indicating Mr. Cohen's net worth, and then going on to say, "The following statements and comments, in my opinion, comply with these instructions."

Do you object to that, Mr. Nyquist?

Mr. Nyquist: I think Mr. Calegari's opinion that they do comply with those instructions—I don't necessarily agree that they accomplish anything.

Mr. Sherwood: They are not proof of the fact that [106] he did or didn't comply with them. I think we will admit that, of course.

Mr. Nyquist: If they are just being submitted

(Testimony of Lesly Cohen.)

as Mr. Calegari's opinions, I don't think we have acted upon his foundation for the opinions.

The Court: You agree that Page 1 comes in subject to that condition?

Mr. Sherwood: Yes, sir.

The Court: Well, the remainder of the page seems to simply list the schedules so I see no objection to that. The same thing applies to the beginning of page two down to the word "comments." I suppose I better read that, at least in part.

Mr. Nyquist: No objection to the second page.

The Court: No objection to the second page, Mr. Nyquist?

Mr. Nyquist: All right, sir, no objection.

The Court: What about the third page?

Mr. Nyquist: I think I better object to that right now, for this reason, that it is apparently injecting a new issue into it, if that is going to be given any weight. Mr. Calegari, in his opinion, found no basis—all right; I contend it is irrelevant for that reason.

The Court: It is a negative statement. He was unable to find a basis. That doesn't mean there wasn't a basis, [107] but do you object to that sentence coming out?

Mr. Sherwood: No, your Honor.

The Court: Very well. We will strike out the sentence beginning, "I was unable to find any basis." What about the balance of that page, Mr. Nyquist? Take your time on it.

Mr. Nyquist: No objection.

(Testimony of Lesly Cohen.)

The Court: Very well. These pages don't seem to be numbered. We will turn to page four.

Mr. Nyquist: Down to B-7, no objection. Beginning with the statement about B-7, it would be subject to the same sort of objection that the schedule itself would be.

Mr. Sherwood: In other words, if Schedule B-7 were admitted, the comment would be appropriate?

The Court: Page four then, we reserve ruling on the paragraph related to Schedule B-7 until we discuss that.

How about the balance of the page?

Mr. Nyquist: No objection.

The Court: What about page five?

Mr. Nyquist: May I ask the witness a question or two on that?

The Court: Yes.

Q. (By Mr. Nyquist): On the balance sheet there are certain amounts shown as owing by you to your brother at various times. I am asking [108] you whether that information is information which you gave to the accountant or which the accountant gave to you? A. Which brother is that?

Q. Melvin.

A. That is for checks that he made out and which my brother, Melvin, turned over to Mr. Calegari.

Q. In other words, Mr. Calegari made the computation from documents?

A. From information that he received from my brother, Melvin.

(Testimony of Lesly Cohen.)

Mr. Nyquist: Your Honor, on this statement headed, "Melvin Cohen," at the top of the page, which Mr. Calegari signed, the first one is objected to as being just an unsupported conclusion of the accountant.

The Court: That is "A" on page five, the signature page?

Mr. Nyquist: Yes.

The Court: What have you to say as to that, Mr. Sherwood?

Mr. Nyquist: That is one of the very issues before this Court.

Mr. Sherwood: That "A" in parentheses?

The Court: Yes; under "Melvin Cohen (A)."

Mr. Sherwood: I think that is a comment that is not necessary for an understanding of the [109] report.

The Court: Very well, we will strike out "A," under "Melvin Cohen."

Mr. Nyquist: B and C, no objection. D, I do not quite understand. I understand that the memos have been destroyed, and I don't see how he bases a conclusion on that as to the amount.

The Court: What relevance does Melvin Cohen's balance as of January 1, 1953, have to this case anyhow?

Mr. Sherwood: We will try to find out in just a moment, your Honor, from Mr. Calegari.

Mr. Calegari's statement is that he was assuming no opening balance and on Schedule B-9 he is recording the transactions which took place in this

(Testimony of Lesly Cohen.)

period, and concerning which he personally examined all of the checks. The records prior to that time were destroyed.

The Court: We are talking about D, under Melvin Cohen. Mr. Nyquist didn't object to the part of it down to the semicolon. He says he doesn't understand the words, "However, the January 1, 1953, balance due Melvin Cohen amounted to \$3,369.32."

What has that to do with the case?

Mr. Calegari: I can answer that, if I may.

The Court: You better consult with Mr. Sherwood before you do any answering.

Mr. Sherwood: I am willing to have Mr. Calegari, who [110] has been sworn, make a statement, but I can't see the relevancy of it.

The Court: I don't know whether Mr. Nyquist wants him to make it or not.

Mr. Nyquist: It is immaterial. If we strike it out, I think it is immaterial. Let's just strike it.

Mr. Sherwood: I can't see its materiality.

The Court: If neither counsel can see its materiality, then under D we strike out everything after the semicolon on the second line.

What about Schedule C-1 as referred to on page five, Mr. Nyquist?

Mr. Nyquist: I have no objection to these comments. I think they are all right, although I am not necessarily going to agree with Schedule C-1, but I have no objection to the balance of this page, your Honor.

(Testimony of Lesly Cohen.)

The Court: As I understand it, as to Items 1 through 7 you make the same reservation as you did as to B-7 on page four? That depends on whether the schedule is in or out?

Mr. Nyquist: I make no reservation on these, your Honor.

The Court: Very well. Then the balance of page five, the signature page, is admitted without objection.

Mr. Nyquist: Very well, your Honor.

The Court: Then we go to Schedule A. [111]

Mr. Nyquist: Exhibit A is objected to because it means nothing. It adds nothing to this case whatsoever. The only figures there that might have any significance are the net worth figures taken from Exhibit B. The other figures are just figures put in to balance that are not from any records of any kind.

The Court: For practical purposes then the question of admissibility of Schedule A depends on what we do with respect to Schedule B; is that right?

Mr. Nyquist: No. I have an additional objection to Schedule A. I say the only figures that have any—we have the net worth figures from Schedule B.

The Court: Yes; I am sorry. I should have said “exhibit” instead of “schedule.”

Mr. Nyquist: If Exhibit B is excluded, this should be excluded for the same reason. If Exhibit B is admitted this adds nothing to it. There are statements in here about net income after taxes

(Testimony of Lesly Cohen.)

which is a conclusion, and I can see that nothing but argument results from this Exhibit A. I can't see that it sheds any light upon anything before this Court, and I therefore object to it.

The Court: We will have to reserve A until we consider B and C; is that right?

Mr. Nyquist: I think that will do for the moment, your Honor. Turning to B, I don't know exactly what we are [112] being offered here. Are we being offered a document which summarizes this witness' testimony as to his assets and liabilities or is this being offered as a summary of an audit prepared by a CPA; just what is being offered?

Mr. Sherwood: I would say, your Honor, in that regard, in the first place, it does definitely summarize the testimony of the witness. He said that he had gone over it and that to the best of his knowledge and belief it was correct. It reflected his net income and net worth for the years in question.

In addition it admittedly, by what Mr. Calegari testified to this morning, is a compilation made up from all the records in Mr. Calegari's office, plus the sheets which were received from Mr. Murton at Mr. Cohen's construction and direction. The evidentiary value of some of these items, of course, depends upon the same thing that the schedules themselves depend upon, from which they were taken. I think they should be in for what they are worth. Also because Mr. Cohen himself has testified that they are correct, and correctly represent his balance sheet as of the dates given.

(Testimony of Lesly Cohen.)

Mr. Nyquist: I wish to make two different types of objection to this. First, if it is to be taken as an expert opinion of a certified public accountant, I object to that. This is not a summary of any records of any sort. This is merely a list. It represents this witness' views as to what [113] his assets are, and anything that the accountant has prepared there is merely on the basis of information furnished to him by this witness and should not be given any greater dignity than the testimony of this witness. It should not be dignified as being something in the nature of an audit or something by a public accountant.

With respect to this being merely a summary of the testimony of this witness, it is respondent's contention that under the decision of this Court in the case of Morris Miller, on April 29, 1955, net worth has nothing to do with this case. That was a case in which, due to absence of records, the Commissioner made a determination on the basis of bank deposits. The taxpayer objected and said net worth more accurately reflected his income and attempted to prove his net worth case, and I will read one paragraph here from the Court's opinion, if I may:

"Petitioner strongly contends that in the determination of the deficiencies, the Commission should not have used the bank deposit method but should have used the increase in net worth method.

"Petitioner concedes that the books and records which he was able to submit to the Revenue Agent

(Testimony of Lesly Cohen.)

for all of the taxable years in question, except 1947, were wholly inadequate to enable the agent to compute his net income by books and records. He contends, however, that respondent in his use of [114] the bank deposit method has greatly inflated Petitioner's net income for all of the years in question except the year 1947.

“Petitioner concedes that the Commissioner has reached about the same figure of net income for 1947 as he has reached in the use of the increase in net worth method. Section 41 of the 1939 Code provides generally that the determination of income shall be on the basis of the method of accounting regularly employed in keeping the books, but where the method employed doesn't reflect income or where proper records are not kept or are lost, the computation shall be in accordance with such method as, in the opinion of the Commissioner, does clearly reflect income.” *Louis Cali*, 7 Tax Court 245.

“The choice as to which method of computation of income shall be applied in a situation such as this, where no books are produced or inaccurate books have been kept, rests not with the Petitioner but with the Respondent, since it is the Commissioner who is given the choice of methods by which income is to be computed where no adequate books or records are kept. We should concern ourselves initially in this case with Respondent's computation of income on the basis of bank deposits.”

The Court: Well, Mr. Nyquist, that case, as I

(Testimony of Lesly Cohen.)

hear you read it—I will be glad to look at it—if you disagree with what I say—it doesn't seem to meet the point here. I [115] fully agree with what I gathered while you were reading it, that the decision says that if the books and records aren't sufficient, the Commissioner can pick and choose under Section 41, I think it is, what method he uses, but I have yet to hear anything said that the taxpayer can't in turn make the effort to rebut what the Commissioner has determined by the taxpayer's own method of computation, whatever it may be, not that the taxpayer can say the Commissioner must determine it by the net worth basis, but that if the Commissioner takes the bank deposit method or any other method, I don't see anything which says that the Petitioner can't come back and try as well as he can, by any method to rebut it.

If there is anything in that decision to the contrary, I will be glad to hear it because it is rather crucial. I mean, you get my point on that?

Mr. Nyquist: Yes, your Honor, I do. I would be inclined to agree to this extent, your Honor: If the Petitioner—I don't think the net worth could be used as a method of arriving at a figure for taxable income. I think that it is probably correct, your Honor, to say that net worth could be used as additional evidence, perhaps substantiating a figure on a return, or something like that, but I don't think the computation could be based on net worth method. I think that is substantially what this case holds.

(Testimony of Lesly Cohen.)

The Court: As to Schedule B, have you any question [116] about the liability?

Mr. Nyquist: Of course, there are certain liabilities on there that have no place in any computation for any of the years in question.

The Court: That has been explained. Liability, even though put in evidence in this way, not necessarily binding in any sense, as I understand it, certain liabilities in here which you contend should be in different years. That is the basis of your view, isn't it?

Mr. Nyquist: Yes, your Honor.

The Court: Hasn't that been explained in the testimony?

Mr. Nyquist: Yes; I think it has, your Honor. I think that the record shows that the Petitioner had these liabilities; whether he had additional liabilities in 1947, we have only his testimony. I have no way of knowing to the contrary at the moment.

The Court: Well, Mr. Sherwood, as to the assets, this witness has testified that they represent all of the assets as far as he knows. As to their being based on records in Mr. Calegari's office, we still don't know what those records are, what the source of them may be. I may have lost myself in the testimony, but I don't quite get what records of Mr. Murton's are referred to as a basis for these assets. You mentioned Mr. Murton's records and Mr. Calegari's records. [117]

Mr. Sherwood: All of the assets themselves are of record in Mr. Calegari's office.

(Testimony of Lesly Cohen.)

The Court: He said so but he hasn't produced any such records or hasn't given us the source of where he obtained them, as far as I recall.

Mr. Sherwood: It was my understanding that counsel did not question them.

Mr. Nyquist: Your Honor, in stipulating to some of these later schedules we intended to eliminate the necessity of his producing those records, insofar as these assets, as far as they are concerned, taken from these schedules a summary of the items detailed in the schedules, I think our stipulation of the schedules would cover them.

The Court: Do I understand that your only real point as to Exhibit B would be that the Petitioner can't come along and offer a net worth statement as evidence in his effort to rebut the matter?

Mr. Nyquist: That is one objection. The other is that insofar as certain items here are concerned, they are based—well, all of this is based on information furnished by the Petitioner to Mr. Calegari. Mr. Calegari has no way of knowing what other assets the Petitioner may have that are not on here. The Petitioner has testified that this is a complete financial statement, and I am willing to go along with the fact that this summarizes the testimony of this Petitioner [118] on the matter. I am not willing to have it go in with the dignity of being a result of a certified public accountant audit of books and records in the sense that—because Mr. Calegari had no way of knowing what other assets this Petitioner might have.

(Testimony of Lesly Cohen.)

The Court: Do I gather that you are satisfied with the assets listed on here, that is, their admissibility into evidence as far as they go and that your point is that it might be interpreted as meaning all the assets?

Mr. Nyquist: Yes; if it goes in as being a result of an audit here, as though the CPA knew that he had all the assets. This witness has said they are all the assets, and I am willing to agree that has been his testimony at this point, but I don't think it is a matter that has been a result of an accountant audit. It has been the result of information furnished by this witness, and I want that point to remain clear.

The Court: Let's see if we can't resolve this. Mr. Sherwood, are you willing to agree that Exhibit B be admitted into evidence subject to the understanding that there is nothing in the record other than the testimony of Mr. Cohen that the assets listed on Schedule B are all of his assets?

In other words, that Mr. Calegari, so far as the evidence shows, had no means of knowing whether Mr. Cohen had additional assets, whether cash or otherwise? [119]

Mr. Sherwood: I think that is obvious, your Honor. No one could possibly know that.

The Court: Well, without argument, and whether it is obvious or not, are you willing to have it come in with that understanding?

Mr. Sherwood: I would like to have the entire report admitted, with the exceptions which have

(Testimony of Lesly Cohen.)

already been stricken out with the understanding that the items here—in fact, all the items under “assets” on Exhibit B are actually items that can be proven one by one here in Court, if it were necessary, but after talking to counsel, he said it wasn’t necessary, with the exception of that one item, entitled, “Kingston Club,” and that is shown, the balance shown on the bank sheets at the beginning of the year, and that is all it is.

The Court: You are getting aside from my question. I am trying to find appropriate language to protect both sides upon it. I have no intention of admitting Schedule B as indicating that Mr. Calegari, as a certified public accountant, in some manner has been able to exclude the possibility of assets in addition to what is on that schedule.

Mr. Sherwood: We certainly agree that he could not do that.

The Court: Well, he did not.

Mr. Sherwood: He did not and could not. [120]

The Court: Very well, then. As I understand it, that removes one of your objections?

Mr. Nyquist: Yes, your Honor.

The Court: The other objection, I assume you still press, that this taxpayer has no right to produce his own net worth statement as distinct from requiring the respondent to produce a net worth statement?

Mr. Nyquist: Yes, your Honor. I might add further that where a taxpayer deals in large amounts of cash, as done here, his net worth state-

(Testimony of Lesly Cohen.)

ment of this sort is entitled to about as much weight—

The Court: That is a matter of argument, is it not?

Mr. Nyquist: Yes, your Honor.

The Court: If it is properly established by net—by any method, bank deposits or otherwise, or properly established that this man had cash, and increasing amounts of cash, from the standpoint of your burden, or if the Petitioner fails to exclude that possibility with respect to his burden of proof in overcoming the presumptive correctness of the respondent's determination of deficiency, then the net worth statement wouldn't be worth anything, but subject to what has been said and subject to motion to strike and argument on the briefs, I will admit Schedule B merely, adding the comment which seems to be agreed to by everybody up to this moment, that the only testimony in this record that these are all of [121] Mr. Cohen's assets as of the dates mentioned, is the testimony of Mr. Cohen himself.

Mr. Nyquist: Exhibit C is objected to for the same reason that the series of papers submitted by Mr. Murton were objected to in the sense that they are conclusions of Mr. Murton—wait a minute; excuse me. I misread this.

Exhibit C is objected to as being merely conclusions of Mr. Calegari that are not supported; a number of the items here, business, profits from business, are the very issue before this Court. Mr.

(Testimony of Lesly Cohen.)

Calegari's statement down here that the income is in those amounts, having never seen the books and records himself, is not entitled to be admitted or entitled to any weight in these proceedings.

The Court: What have you to say?

Mr. Sherwood: I think, your Honor, the same argument goes to the summary sheets from which they are made. Mr. Calegari did not purport to introduce anything new. He testified that he got his information from the records which are already at least provisionally in evidence. There is no difference between Exhibit C and Exhibits—whatever their numbers are—six, seven, eight and nine and ten. They are all bound up in there.

Mr. Nyquist: I agree fully with Mr. Sherwood's statement that there is no difference between this and Exhibits 7, 8, 9 and 10, and they were admitted solely for the purpose of [122] showing what the income tax return was based on, and only for that purpose. This is not admissible for that purpose.

Mr. Sherwood: I think that the record will show that there was some qualification why they were admitted. They are admitted also for the broad charge; for another thing the Court didn't limit that to the fact you mentioned. But this summary sheet, Exhibit C, represents the income we allege he got from the Kingston Club. Also the income from the partnership with Herbert A. Cohen, his interest, his deductions. As I understand it, there is no objection to the deductions. The only objection is that we are attempting, according to Mr. Nyquist,

(Testimony of Lesly Cohen.)

to dignify, the report as though it were the result of an audit, but I think that is not a correct comment, your Honor, because Mr. Calegari told us exactly what he based these figures upon.

I think the objection on all these matters goes to the weight rather than admissibility.

Mr. Nyquist: I think this adds nothing at all to what is already in the record here. It just repeatedly puts in figures that were based on some papers that were used in preparing the return, but for which no foundation was laid by merely putting them in in different places and forms. That is not adding any information that is useful to this Court.

The Court: Mr. Nyquist, subject to the view that Schedule C couldn't possibly be taken is any statement that [123] this is all of Mr. Cohen's income; this is merely the amount of it that Mr. Calegari's report sets out on the purported basis of other factors in the record.

What, if any, items of income do you maintain are not supported by the record up to the moment?

Mr. Nyquist: Well, your Honor, we know there is an awful lot of money that came in here that isn't shown somewhere. Apparently the records are not maintained by the taxpayer to show exactly where it came in, and I don't think that we can particularly point exactly where that may have been received.

I think certain of those items, the exact amount of dividend income that was found by Mr. Calegari is shown there; the exact amount of a couple other

(Testimony of Lesly Cohen.)

items of income from partnership was found by Mr. Calegari as shown there. There is a lot of money that came from somewhere that isn't shown there.

I fail to see where this summary sheet adds anything at all to the information; that is, the basic data is all in the record. If this is intended to be evidence of something other than a mere summary, it is adding nothing, and if it is intended to be a summary, it is not a particularly useful summary.

The Court: It is a convenient one, isn't it?

Mr. Nyquist: I don't believe so, your Honor.

The Court: Why not? [124]

Mr. Nyquist: Well, because insofar as some of those items are concerned, they are items that have not been established. They are the very items in dispute.

The Court: Just point out one to me. I am not disagreeing with you or agreeing. I am trying to follow you.

Mr. Nyquist: Well, of course, that Kingston Club, in particular, Mr. Calegari states quite definitely in his beginning pages, that that is not based on any books and records.

The Court: But he stated his method of ascertaining it.

Mr. Nyquist: Yes, your Honor, and when we get down to putting it in that way, his method of ascertaining it is based entirely on unsubstantiated reports which were admitted already for the limited purpose of showing what the return was prepared from and to admit those unsubstantiated reports

(Testimony of Lesly Cohen.)

again in here is adding nothing useful in this case. This is not the document that the returns were prepared from. I see no reason for putting those unsubstantiated figures in several times just to make them look stronger.

The Court: Mr. Sherwood, do you contend that Schedule C is anything more than a summary of what is already in the evidence?

Mr. Sherwood: It is a summary of these various schedules which already have been admitted. [125]

The Court: Well, it is a summary of some of the testimony as well, isn't it?

Mr. Sherwood: Yes; but I would like to correct one misapprehension. Counsel says, for example, that a profit from the business of the Kingston Club is entirely unsubstantiated. I am not in any way trying to say that the method accounted for the cash because the evidence shows that the cash was not included, but, nevertheless, the profit shown here is the profit shown by analysis of the bank accounts.

Mr. Evje stated that it was based upon that and they did not take into account any cash at all. I don't see why counsel objects to the fact that we say they made \$19,750 in 1948. If he has any evidence, or if there is any evidence of any kind that Mr. Cohen made more than that, let him bring it out, but this much we have established from the bank account. Mr. Evje testified to that. They didn't grab the air and take these figures.

The objection, as I see it, from counsel's stand-

(Testimony of Lesly Cohen.)

point, is that they didn't take into account the cash, so if there were more cash than Mr. Cohen says there was, then this figure would be higher, but it wouldn't be lower. This is the amount actually in the bank, and I think we are entitled to have that in. It is a very convenient record for us to use, and if it doesn't add anything to what is already in, I can't see why it should be objected to. It is a convenience to me in writing the [126] brief and I think it would be a convenient summary for the Court to have.

The Court: There is no use going any further on it. I am rather puzzled as to the evidentiary value, if any, of Schedule C. It seems to me that it take figures that were either in other schedules or were testified to, and it simply summarizes the Petitioner's version of what his income was.

There is nothing in here, of course, at all about cash, and so far as I know, there isn't even any testimony in the case that this represents all of Mr. Cohen's income, or that anybody knows whether it does or not, but there is some evidence that there was at least this much income. I can't see my way out of the woods on this at the moment.

I am going to admit it subject to motion to strike, and argument on the brief. That brings us back to Schedule A, which is dependent upon Schedules B and C, and otherwise is substantially worthless, as far as I can see, and is nominated as a summary of net worth. I am going to admit it subject to

(Testimony of Lesly Cohen.)

motion to strike and argument on the brief in connection with Schedules B and C.

The next schedule we have to consider is B-7.

Mr. Sherwood: I think the determination on that will depend upon eventually your ruling on the motion to strike, will it not? It is just an amplification of the same item that counsel [127] objected to.

The Court: It seems to be.

Mr. Sherwood: If you strike Exhibit C, you would strike this exhibit along with it, I take it?

The Court: Well, actually, wouldn't it be if I struck Exhibit B, or, rather, Schedule B? This Schedule B-7 appears to be a balance sheet and reconciliation of net worth. It would take into consideration both Schedule B and Schedule C-1, which we haven't come to yet, but it doesn't seem to add any fact.

What is your objection to Schedule B-7, Mr. Nyquist?

Mr. Nyquist: Well, this is intended to be a balance sheet, and I don't think that has been supported by anything in the record, as to where those figures came from. I think that is my chief objection, to begin with.

The Court: Of course, this is really a subsidiary item anyhow. It purports to be only a balance sheet of the Kingston Club, and is not a complete balance sheet, or not a complete reconciliation, as I understand it.

Mr. Nyquist: My objection to the top half of

(Testimony of Lesly Cohen.)

the page is that it is a balance sheet item, unsupported by anything in the record, and my objection to the bottom part of it is that it is irrelevant and assumes certain conclusions as to the income. The conclusions are some of the very issues before this Court.

The Court: What is your view, Mr. [128] Sherwood?

Mr. Sherwood: I am not an accountant, your Honor, but it seems to me this is one of the mechanical means that the accountant uses to explain what he has done in his work. It doesn't add any new evidence. Unless the evidence in the record justifies the Court in making findings, I am sure that this wouldn't supplement the evidence, so that you could make any additional findings, but I think it is part of the accounting procedure which would be helpful to all of us, and it does not add anything, as far as income is concerned, to the evidence which we have in the record, but it shows how all these schedules were pulled together, and arrived at in the summary.

Mr. Nyquist: There is a point I would like clarified here. Mr. Sherwood says something about it, that it isn't any new evidence. It is merely either a summary or taxpayer's contention. If they are admitted to show what the taxpayer's contention is, all these exhibits, I have no particular objection to them.

I do object to a good many of them as being evidence of the facts that are reported therein.

(Testimony of Lesly Cohen.)

The Court: Mr. Sherwood, why don't the whole of B-7, why couldn't that be put in your brief?

Mr. Sherwood: I suppose if the brief writer would go around and do what Mr. Calegari did when he made it up.

The Court: I think he would. He could copy this [129] and make what references he has.

Mr. Sherwood: I can't see, with the understanding and qualifications that the Court has already put in the record, I can't see why the whole thing is not properly admissible as a statement of what the accountant found; it is tied in to all the documents we have.

The fact that it doesn't account for the cash has been testified to by all three witnesses and that should be understood. But it does purport to be perfectly complete as far as it goes, and we know what it is based upon.

The Court: What about Schedule C-1, Mr. Nyquist? I am going to rule on B-7.

Mr. Nyquist: That is the most objectionable one in the group. The first few lines in that are entirely—there has been nothing to show where those figures came from. I don't think Mr. Calegari has identified those figures in any respect.

The Court: You are talking about the receipt item?

Mr. Nyquist: I am talking about the receipt item and disbursements on bets; where he got those figures I don't know.

The Court: Mr. Sherwood?

(Testimony of Lesly Cohen.)

Mr. Sherwood: I did not ask Mr. Calegari about that. If you will recall, we reached an impasse on some other matters, but I do know what he did and I can recall him to clarify [130] it.

The Court: I suppose we better dispose of this while we can. I am going to admit Schedule B-7, subject to motion to strike and argument on the brief, and the same with respect to Schedule B-7 on page four of the preliminary statement.

You can withdraw this witness for the moment, if you wish, and put Mr. Calegari back on the stand in reference to Schedule C-1, or whatever you have in mind.

(Witness excused.)

Whereupon,

ADOLPH CALEGARI

called as a witness for and on behalf of the Petitioner, having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Sherwood:

Q. Mr. Calegari, may I ask——

The Court: Just a minute. I have also ruled on Schedule A, as I understand it. I think I have ruled on everything, of course, subject to qualification, except for Schedule C-1.

Before Mr. Sherwood starts to question this witness, Mr. Nyquist, it might save time if you would

(Testimony of Adolph Calegari.)

indicate whether you have any objection to any part of Schedule C-1 except the item, "receipts, bets," and the two items of disbursements, [131] "Bets—identified," and "Bets—unidentified."

Mr. Nyquist: I have not had time to compare that but I assume that with the exception of those items at the top, that these other items repeat the items on the return which were allowed.

The Court: Very well. Go on then, subject to check. You can bring them up later, if you wish.

Q. (By Mr. Sherwood): Schedule C-1 is entitled, "Lesly Cohen, Kingston Club, Summary income and expenses, January 1, 1950-December 31, 1950."

Mr. Calegari, will you state what you did in comparing Schedule C-1 of your report?

A. Schedule C-1 has a heading, "Anglo-California National Bank Commerical Account." The item of "receipts, bets, \$283,000" represents the deposits that went into that account during that period.

The Court: That is all the deposits?

The Witness: All the deposits in the commercial bank account with the Anglo-California National Bank for 1950. The item of disbursements—

The Court: Wait a minute, now. What about "Receipts—cash":

Q. (By Mr. Sherwood): Cash deposits and checks deposits; is that right? A. No. [132]

The Court: Don't lead, Mr. Sherwood. Let him answer the question. I assume he knows the figure, and the reason for it. He is testifying to it.

The Witness: The item of "cash" represents

(Testimony of Adolph Calegari.)

the receipts during that period, which were not deposited.

The Court: How do you know that? On what basis did you determine that amount of cash?

The Witness: On the basis of the difference between the receipts—no. On the basis of the difference between the bank accounts, opening and closing balances.

The Court: On that solely or did you take into consideration factors such as expenses?

The Witness: Including the expenses, and the withdrawals.

The Court: So there was a synthetic figure based on your calculation from bank statements at the beginning and end of the year with the other adjustments you discussed prior?

The Witness: That is right. The item of disbursements, bets-identified are detailed on this Exhibit No. 8 here, which is an analysis of the disbursements from that same bank account, and the items of bets are identified here, symbolized by the red "B's."

The Court: Those have not been identified yet, Mr. Sherwood.

Mr. Sherwood: I am aware of that, your Honor. I am [133] going to ask Mr. Cohen about that. I have the checks here. The witness has them in his hand, as a matter of fact, and I am going to identify them.

The Court: I may have missed what you said, but what did you say with respect to bets—identified?

(Testimony of Adolph Calegari.)

The Witness: Bets—identified are the totals of these checks that I hold in my hand.

The Court: How did you select them, and what do they show?

The Witness: The checks are made payable to various and sundry people, and I made a complete analysis of the disbursements by payee, and then Mr. Cohen instructed me as to which ones were for bets.

The Court: It looks to me, Mr. Sherwood, as if you are going to have to withdraw this witness again and do something about your bets under disbursements, but in the meantime, before you withdraw him, have you any objection, Mr. Nyquist, to these two figures of receipt bets, as far as they go; one, the total of all the checks in the Anglo-California National Bank, commercial account; and the other the cash, with the understanding of how it was determined?

Mr. Nyquist: Yes, your Honor, I do object to labeling those. I have no doubt but what Mr. Cohen had receipts and bets in those amounts, and far in excess of those amounts.

The Court: What is your objection to the fact that [134] he has at least this much?

Mr. Nyquist: Well, if it be stipulated that this simply means that he had at least this much, without any special significance being attached to this figure, but I am afraid once this figure gets in people will try to attach significance to it and say, "This is a figure of bets," and it is merely a con-

(Testimony of Adolph Calegari.)

clusion of a witness as a result of a long process of assumptions.

The Court: Mr. Sherwood, are you willing to admit at this point that there has been nothing to show that he didn't have more receipts from bets than is listed here in that commercial account and the cash item?

Mr. Sherwood: Yes; I will state that he must have had cash receipts in addition to those that went in the bank, according to the witness' own testimony.

The Court: All I am asking you—I am not asking you to admit these figures are wrong, and I am not accepting them as right, but right or wrong, from my standpoint, all I mean to say is is there any testimony in this record that for this period, January 1, 1950, to December 31, 1950, that he didn't have a total of receipts from bets more than \$300,783.57?

Mr. Sherwood: I am willing to accept that, your Honor.

Mr. Nyquist: If the further proviso is that that figure for cash bets is an unsubstantiated figure. That is [135] just a conclusion of the witness.

The Court: Let's not use the word "unsubstantiated" because it requires us to do a little more work in the art of definition than I think any of us are capable of. It is perfectly clear it is a calculation based on beginning and ending bank accounts with other adjustments that have been discussed in the record and here in addition to that

(Testimony of Adolph Calegari.)

there is the statement of counsel that he agrees that up to the moment, at least, there is no testimony in the record—let's assume for purposes of illustration—and I don't know what the figure is, that you have determined that these receipts were from bets of this same period over \$500,000. That is your determination. You haven't any evidence in yet.

Mr. Sherwood comes along and submits this first item and agrees that as far as his case is concerned, nobody has yet said that is the top figure, all that has been said so far is that it is at least that much; is that right?

Mr. Sherwood: That is right.

The Court: And what is your objection to it, with that explanation?

Mr. Nyquist: My objection to the figure of \$17,-753 is that when it was put in this bank, it looks as though it is something that has been substantiated in some sort of way, or calculated in some reasonably accurate manner. We have heard the evidence as to how he went at it; that it was some difference [136] in cash position apparently, plus certain other unexplained adjustments, and these other adjustments in there, the details of which we don't know, call for a great many conclusions on the part of the witness, and it makes that figure, nothing more than a very rough approximation and an opinion of the witness. It is not an opinion that is entitled to any weight at all.

The Court: I have your point on it. Go ahead, Mr. Sherwood.

(Testimony of Adolph Calegari.)

Mr. Sherwood: Are there any other points concerning this schedule except the one that I am going to have to call Mr. Cohen for on the bets-identified and bets-unidentified?

The Court: This witness has still not testified, as far as I know, or has anybody testified as to just how he got, just what the adjustments were and how he got them after he got finished comparing the beginning and ending deposits?

I don't know whether you want to prove it by this witness or not, and I don't know how he would know what the expense items were, but so far as I know, the record isn't clear on it.

Q. (By Mr. Sherwood): Can you state what you did in connection with the matters the Court just mentioned? A. I think so.

Q. Will you please do so? [137]

A. The items of totals on this Schedule C-1, exclusive of the bets which we have already discussed, those items of expenses are the items of——

The Court: No; that is not what we are talking about, Mr. Calegari.

The Witness: I am sorry.

The Court: We are right back to the cash items of \$17,653.77. You have testified you determined that was receipts from bets on somewhat this approach. You took the bank balance at the beginning of the year, the bank balance at the end of the year, you subtracted one from the other, and you added certain items which have been very vaguely de-

(Testimony of Adolph Calegari.)

scribed as expenses of one sort or another; is that right?

The Witness: That is right.

The Court: How did you determine your additions back in getting at this \$17,653.77 figure?

It may be simpler from your standpoint to start fresh and tell us how you got at the 17,653.77 figure under the title of "cash" in the first item of Schedule C-1, "receipts, bets."

The Witness: I don't know whether I will be able to explain this to your satisfaction.

The Court: That is always a hazard, but you can try.

The Witness: I actually didn't change any of the expense figures on here. Of course, the expense figures were [138] the figures used in developing the gross receipts, as I have already testified. The expenses on here are the same ones that are shown on the statements presented by Murton. So that in the development of the gross receipts, I simply added the bets-identified and the bets-unidentified to the expenses shown on the Murton statement.

That is all I have done in arriving at that \$300,000 figure. I have simply added the deposit that went into the bank to the gross receipts that were on the schedules supplied by Murton.

Mr. Nyquist: If your Honor please, isn't that another way of saying that is the figure that is necessary to put in there to get up with the income shown on the return?

The Witness: That is correct. I am sorry for

(Testimony of Adolph Calegari.)

having answered that out of turn, but that is exactly what happened.

The Court: Do I get it then that the item of \$300,783.57 is the total receipts shown on the return?

The Witness: No; it is not, your Honor. The deposits in the commercial account were not considered on the tax return. This was a calculation that I made as the result of the bank statements and cancelled checks for 1950, and I wanted to summarize what had happened in that account during that year. It is not necessarily a total of the receipts. It is simply a summary of what happened to that commercial account during that year. [139]

The Court: Well, it is simply what happened to the commercial account that year, but what we have to know is what did happen, and all you tell us is that you concluded a figure from what happened, but you haven't told us what happened yet. That is what we are trying to get at. You did tell us one figure. You said that this first item of \$283,000-odd was simply an addition of all deposits in that account during the year.

What did you do after that?

The Witness: I also summarized the disbursements in that account for that year.

The Court: You summarized the disbursements but they could have been a number of types; in some what you seem to have segregated personal expenses, or rather, you made that kind of a closing

(Testimony of Adolph Calegari.)

figure and separated it from items of expense; is that right?

The Witness: I have a complete analysis of the disbursements here by payee.

The Court: Mr. Nyquist, can you, one of your men and Mr. Sherwood get together with Mr. Calegari and look this over, what he calls a complete analysis, which is, as far as I know, you haven't seen yet, and which may get us closer to what we are aiming at?

Mr. Nyquist: In answer to my question a moment ago, I think the witness agreed with me when I said that figure is a [140] figure——

The Court: What figure?

Mr. Nyquist: Derived by arithmetic, which is the figure necessary to produce the income shown on the return.

The Court: I understood him to say later that it wasn't the income shown on the return.

Mr. Nyquist: Net income shown on the return. The gross figure did not show on the return in this amount.

The Court: See if you can't cross-examine him a little further so it can get through my head. After all, I haven't had the opportunity to prepare this case. It is all new to me and I would like to understand that point, Mr. Nyquist, if you can bring it out a little bit clearer.

Mr. Nyquist: I don't purport to understand the taxpayer's unique method of accounting myself.

The Court: Can you consult with your confreres and tell us what is wrong with it, or haven't you had time enough to do it? I am not trying to ask you a puzzle question. I am trying to move, if we can,

(Testimony of Adolph Calegari.)

but not to hurry you. If you are not in position to answer it, all right. I don't expect the impossible.

Mr. Nyquist: No, I am not, your Honor, except that from the testimony of this witness I gather this is a figure which he calculates working backward as to the amount of cash there must have been in order to produce the income that he [141] showed; is that right?

The Witness: That is right.

The Court: You started with net income shown on the return?

The Witness: I started with Mr. Murton's statement, your Honor.

The Court: Mr. Murton's statement of what?

The Witness: Of the income and expenses for that year.

The Court: And we have never had the basis of Mr. Murton's statement. I have forgotten for the moment, but what is the status of Mr. Murton's statement, as far as the evidence is concerned?

Mr. Nyquist: Mr. Murton's statement was admitted for the purpose of showing that the return was based on that——

The Court: Merely showing how the return was prepared.

Mr. Nyquist: And there were assumptions in there, and this witness is piling assumption upon assumptions.

Mr. Sherwood: Mr. Evje testified as to the method by which Mr. Murton arrived at his summary, and whatever criticism might be made of the

(Testimony of Adolph Calegari.)

method, there should be no doubt upon this record as to how he did it.

Mr. Nyquist: Nobody is questioning that, but you are passing on, it seems to me, Mr. Sherwood, from a question [142] of how the return was prepared to the question of what was income, and there are two very different things. I am not at the moment able to take the leap with you. I am trying to find out if we can take it or not, but there are two different things there.

Mr. Nyquist: I might also point out too, your Honor, that Mr. Murton's summaries were admitted for the purpose of proving how the return was prepared. Now Mr. Sherwood says that Mr. Evje explained how Mr. Murton did it, as if that fortified Mr. Murton's conclusion.

All Mr. Evje did was to explain the general method of approach. There was not enough detail or explanation to determine the accuracy or correctness of Mr. Murton's work in any respect, and this witness himself, to the extent he has found records, has found Mr. Murton's work was inaccurate.

Mr. Sherwood: I will take exception to that last statement. There is substantial agreement between the work that Mr.—

The Court: Well, there are a few minor changes; they don't amount to a great deal in a case of this type, but what it seems to me is happening at the moment, is that these statements made by Mr. Murton were admitted for the sole purpose of showing how the return was made out, certain collateral evidence with respect to the question, possible ques-

(Testimony of Adolph Calegari.)

tion of this taxpayer's intent. The present witness seems to [143] be using Mr. Murton's figures as a starting point for income, and it is my understanding that they haven't been admitted for that purpose, nor substantiated for that purpose.

Mr. Sherwood: I think, your Honor, they have been substantiated in this respect. We have a question here of lost or missing records. The bank statements were in existence when Mr. Perenti made his examination. Mr. Murton died and they were lost except for 1950, and as to 1950, we have made a very complete presentation, with a complete breakdown, but the bank statements aren't here, yet Mr. Evje testified that they were the basis of Mr. Murton's running monthly reports which were summarized in the end of the year, and which were the reports which were given to Mr. Calegari for the purpose of filing the tax returns. That is what we have.

There is no use in our trying to say that we are going to produce something else because we haven't got it. Mr. Murton is dead. The bank records followed him, for all practical—disappeared with him for all practical purposes. We have made diligent effort, the evidence shows, to find them and we can't find them. They were in existence, and these reports were made from the bank reports at the time, and Mr. Evje told how it was done. That is secondary evidence but it is the best evidence we have. It is admissible because the primary evidence is not available.

Mr. Nyquist: Is Mr. Sherwood seriously con-

(Testimony of Adolph Calegari.)

tending [144] this is the amount of the cash bets in that year?

Mr. Sherwood: Cash bets?

Mr. Nyquist: Yes; is that your contention?

Mr. Sherwood: I am not making any contention about cash bets at all. I am contending that the reports that Mr. Murton made were adequate in so far as they purported to go. In other words, they were based on the bank account, and they also had the expenses which apparently aren't in controversy, but he didn't take into account the cash revolving fund or any other cash. Witnesses have so testified. I can't produce what I do not have, but I do think that we have, by laying a foundation that there were certain records, and those records were in the possession of Mr. Murton, and he died and the records disappeared.

The government's Revenue Agent, Mr. Perrenti, had a chance to look at those records when he made his audit prior to the last audit, and I can't see why the Court would keep out such evidence as the Petitioner has, even though it is secondary evidence, when the primary evidence has proved not to be available.

Mr. Nyquist: Mr. Sherwood says they can't produce evidence which they don't have, which of course is true. The reason he didn't have it—he tries to make it appear—is because they were lost, whereas, the testimony plainly shows that the taxpayer either failed to keep the records, or is un-

(Testimony of Adolph Calegari.)

willing to [145] produce records of the business that were had and the cash received.

The Court: It has been made rather plain that he didn't keep adequate records with respect to the betting commissioner activities as distinct from the card club. However, we don't seem to get anywhere attempting to refine this issue.

You go ahead, Mr. Sherwood, with your witness. We have ruled on everything now except Schedule C-1, and I think that you agree that there are some open spots in that connection.

Mr. Sherwood: I am going to ask Mr. Cohen about the bets-identified, but I think this witness could tell us where he got this figure of \$42,058.75, which is stated to be bets-unidentified.

The Witness: I testified earlier that I didn't have the bank statement nor the cancelled checks for the month of January, 1950. However, I did get from the bank a copy of the bank statement. The bets-unidentified are the round figures in large amounts that appear on the January, 1950 bank statement for which we have no cancelled checks, and I have assumed that they were bets that couldn't be identified.

Q. (By Mr. Sherwood): Do you have that bank statement for January? As I understand your testimony, you didn't have the checks that would normally go with the bank statement for January. Your [146] testimony is that for large amounts which were withdrawn, you have assumed that those were issued in the payment of bets?

(Testimony of Adolph Calegari.)

A. That is right; if I may add something, that seems to follow the pattern for the remaining 11 months of that year.

Q. For the 11 months where you do have the checks, the larger checks are all in payments of bets? A. That is right.

Q. According to the information that you received? A. That is right.

The Court: As I understand it, you got that information from sources that are not in the record yet?

Mr. Sherwood: That is right.

The Court: Before I lose myself too much on these figures, when you are talking about bets now, are you talking about the total amount of bets or are you talking about commissions or what?

A. My understanding of that is that these checks were issued——

Mr. Nyquist: Objection, your Honor. I think that this witness was not there. I would think that he doesn't know what these bets were.

The Court: Counsel ought to be able to agree with me as to what the word "bets" means here.

Mr. Nyquist: I thought your question related to whether these were payments of individual bets or settlements [147] of accounts.

The Court: No; I am trying to keep this record as clear as I can. For instance, we start out with receipts-bets. We don't say there is anything to distinguish that from commissions earned from bets. I

(Testimony of Adolph Calegari.)

want to get the record clear by the statement of counsel.

Mr. Sherwood: The testimony of Mr. Cohen will show that the disbursements here by check were in payment of obligations which he had incurred by reason of accepting these wagers. It doesn't mean that he lost the money but it means he got the money from somebody else. He was primarily liable on all these things.

The Court: He places a bet for A, and balances it with B. B wins, and A pays up. That is a receipt.

Mr. Sherwood: Mr. Cohen would then pay B, but my point is if A didn't pay——

The Court: That is a disbursement.

Mr. Sherwood: But if A didn't pay for any reason at all Mr. Cohen still paid.

The Court: I don't want to get into argument, but the receipts-bets are what the losers pay, and disbursements of bets are what Mr. Cohen pays to the winner. I am leaving out the calculation of the commission.

Mr. Sherwood: That is correct, your Honor.

I would like to offer into evidence, and counsel has [148] no objection, the bank statement for the month of January, 1950.

The Court: Be received.

The Clerk: Exhibit 11.

(The document referred to was marked Petitioner's Exhibit 11 and received in evidence.)

(Testimony of Adolph Calegari.)

Mr. Sherwood: I think that covers everything we can get from Mr. Calegari.

The Court: You can withdraw him and put Mr. Cohen on. Do you want to cross-examine?

Mr. Nyquist: I would like to ask a couple questions.

Cross-Examination

By Mr. Nyquist:

Q. Mr. Calegari, did you ever see any record showing the amount of bets placed in any of these months? A. No, sir.

Q. Do you know whether there were any such records? A. I do not.

Q. And your figure that you have there is not based upon records of bets placed but is a calculated figure based upon other information?

A. Based on the amounts that were deposited in that account during the year.

Q. When you say "based upon that" and upon other information, is that right?

A. That is right. [149]

Q. It is a calculated figure that in substance is the figure which you know the bets must have been in order to produce a net income of the figure shown? A. That is right.

Q. One other question. Have you met Revenue Agent Glenn Adrian in this room?

A. Yes; I know Mr. Adrian.

Q. Prior to the issuance of the statutory notice, did you have a conversation with Mr. Adrian? To

(Testimony of Adolph Calegari.)

be more specific, did Mr. Adrian ask you for books and records of Les Cohen? A. No, sir.

Q. Did he ask you where the books and records of Les Cohen were? A. I don't believe so.

Q. Did you refer Mr. Adrian to Mr. John Lewis?

A. I believe that was a telephone conversation.

Q. Did you have a telephone conversation with Mr. Adrian about whereabouts of the records of Mr. Les Cohen?

A. Yes, I believe so. I think it was a telephone conversation and I told him that all of the records that I had were in Mr. Lewis' possession.

Q. This was prior to the issuance of the statutory notice?

A. I don't remember when the statutory notice was issued.

Q. The statutory notice was issued in November of 1952? [150]

A. I think it was subsequent to that. I am not sure. I haven't any record of the date of that telephone conversation but it seems to me it was after that time because this report is dated in 1954.

Q. But prior to your preparation of this report did you have a conversation with Mr. Adrian?

A. Yes; I believe it was prior to July 2, 1954, but I haven't the remotest recollection of when that was.

Mr. Nyquist: No further questions.

The Court: That is all.

(Witness excused.)

(Testimony of Adolph Calegari.)

Mr. Sherwood: Your Honor, during the recess we followed the Court's suggestion and counsel and the revenue agents discussed the Petitioner's Exhibit 8 in relation to the identification letter "B" in red which appears on this. That is Mr. Calegari's analysis of the bank account for the year 1950, and we have here all of the checks which were issued on that account in payment of obligations where a customer or another broker was entitled to collect from Mr. Cohen, and counsel had Mr. Adrian check these hurriedly, a spotcheck, and is willing, rather than identify each specific check, to ask Mr. Cohen the general questions as to what this symbol means on the sheet.

The Court: All right.

Mr. Sherwood: Mr. Cohen, will you resume the stand? [151]

Whereupon,

LESLEY COHEN

the Petitioner herein, having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Sherwood:

Q. I will ask you, Mr. Cohen, did you go over the checks for 1950 with Mr. Calegari?

A. At what time?

Q. Just recently? A. Yes, today.

Q. And did you, at the time you prepared these

(Testimony of Lesly Cohen.)

worksheets, tell him which ones of the checks he had on the sheets represented payment of bets?

A. That is right.

Q. You were in court while Mr. Evje described the way the accounts were kept at the Kingston Club, kept by Mr. Murton? A. Yes.

Q. Can you tell us why no more detailed records of cash were maintained during the period we have in question here?

A. On the commission account of the Kingston Club?

Q. Yes.

A. Well, I felt it was safer, and precautionary to keep as little memoranda in my possession in connection with that operation as possible, being that it was illegal and I was [152] always subject to being visited by law enforcement officers.

Q. In your opinion, did the amount which Mr. Murton employed actually reflect your income for those years? A. Yes, I believe so.

Q. And have you examined Schedule C of Exhibit 7, which I will now show you?

A. Yes.

Q. And in your opinion, does that correctly reflect your income from the Kingston Club in the three years in question here?

A. That is right.

Q. You stated, I believe, that the first part of your testimony, that you lived in a house with your brothers and sisters? A. That is right.

Q. During these three years? A. Yes.

(Testimony of Lesly Cohen.)

Q. And what were your expenses for living in that manner in those three years?

A. Are you speaking of household expenses?

Q. Yes, sir.

A. I would say approximately \$100 a month.

Q. From what source did you defray those expenses?

A. That was usually paid by my brother Melvin out of my stock dividends. [153]

Q. Will you amplify that a little bit?

A. That \$100 monthly?

Q. Tell us how your brother got the money and what he did with it?

A. Well, checks for the stock dividends usually were addressed to my home, 471-12th Avenue, and they were turned over to him and banked by him, and he would draw checks against the account to meet any household expenses charged against me.

Q. Did the other members of your family also contribute to the expenses of maintaining the home?

A. That is right.

Q. How many of you lived there?

A. In those years, a total of five.

Q. And who owned the house during those years?

A. That would be after my mother's death; my brother Herbert and I owned it.

Q. When did your mother die?

A. Approximately '47; '46 or '47.

Q. From what source were any other of your personal expenses paid?

(Testimony of Lesly Cohen.)

A. Usually from my checking account, personal checking account.

Q. For instance, if you bought clothes, how did you pay for them? [154]

A. As a rule, by check.

Q. And can you recall any large or unusual expenses that you had during these years?

A. I never had any personal expenses.

Q. Are all of the withdrawals that you made for your personal use or for any investment reflected in this statement which I exhibit to you, Petitioner's Exhibit No. 7?

A. My personal withdrawals are against my personal account.

Q. Are all the withdrawals that you made from the Kingston Club set forth in the schedules on the Kingston Club? A. That is right.

Q. In other words, the summary sheets which you received from Mr. Murton, in your opinion, correctly reflect your withdrawals?

A. That is right.

Q. And how often did you get reports from Mr. Murton? A. Once a month.

Q. Did you check them at the time?

A. Yes; I checked them.

Q. And those are summarized for you at the end of each year? A. That is right.

Mr. Sherwood: You may cross-examine.

The Court: Mr. Nyquist? [155]

(Testimony of Lesly Cohen.)

Cross-Examination

By Mr. Nyquist:

Q. Have you met Revenue Agent Glenn Adrian, who is at the end of the table here?

A. Yes, sir.

Q. Prior to the issuance of the notice of deficiency to you, did you have a conversation with Mr. Glenn Adrian about the whereabouts of your books and records? A. Yes, sir.

Q. And what information did you give Mr. Adrian at that time?

A. I referred him to Mr. Lewis.

Q. You told him Mr. Lewis had all the books and records? A. I referred him to Mr. Lewis.

Q. Didn't you tell him Mr. Lewis had your books and records?

A. No; I referred him to Mr. Lewis.

Q. Are you also sure about that?

A. I am positive.

Q. Where were your books and records at that time? A. I don't recall.

Q. Did you keep any sort of records on the monies received in your betting business?

A. In my bank business?

Q. Betting business. [156]

A. My betting business?

Q. Yes.

A. Not for any length of time, no, sir.

Q. Will you amplify that? You mean you kept a temporary record of bets placed but once they were

(Testimony of Lesly Cohen.)

paid off and the record was clear you did not maintain the records?

A. I destroyed them; that is right.

Q. Did you ever turn any records of your cash received over to Mr. Murton?

A. Any cash received?

Q. Yes? A. No, sir.

Q. Did you receive checks that didn't go into your bank account? A. Yes; on occasion.

Q. Did you receive cash that didn't go into your bank account?

A. Only to meet my revolving fund.

Q. Your answer is yes, you received cash that didn't go into the bank account? A. Yes.

Q. Did you ever tell Mr. Murton the amount of such cash?

A. No; when it got large enough I put it in the bank.

Q. Did you make large bank desoposits of cash?

A. Not particularly. [157]

Q. Who kept your bank statement and your checks?

A. What do you mean by that question?

Q. Well, Mr. Murton apparently made certain calculations from them. What happened to them after that?

A. He had them, to my knowledge.

Q. Do you know when he destroyed them?

A. I have no idea.

Q. Or when they were lost? A. No.

(Testimony of Lesly Cohen.)

Q. Did you do any personal betting for pleasure outside of your regular business activities?

A. You mean now?

Q. Did you in these years? A. No.

Q. Did you have any safety deposit boxes during these years? A. Yes.

Q. Where was that?

A. Bank of America, Day and Night Branch.

Q. Have you read the stipulation of facts that was agreed to between your counsel and us in this proceeding in which a great many checks were itemized and detailed?

A. Checks that you have?

Q. Yes; checks of which we have photostats?

A. I understand you have a lot of checks but I haven't [158] read the stipulation.

Q. And you don't know what checks are covered in the stipulation? A. Definitely not.

Q. You don't know whether the stipulation reflects all the checks that you received in these years? A. I didn't read the stipulation.

Mr. Nyquist: May I have the Court's file?

Q. (By Mr. Nyquist): I show you the petition and the court legal file in this case and ask you if that is your signature on that?

A. That is right.

Q. You swore to the statements contained therein? A. That is right.

Q. You swore that you are familiar with the facts in this statement and that they are true,

(Testimony of Lesly Cohen.)

except as to those stated upon information or belief, and those you believe to be true?

A. That is right.

Q. I call your attention to a statement in paragraph II of the stipulation, or of the petition, rather, the second sentence:

“Petitioner caused true and complete books of account to be maintained in respect of all the transactions of the said Kingston Club, which books were kept by a reputable [159] duly licensed public accountant with offices in San Francisco, California.”

Is that statement correct?

A. That was for the Kingston Club?

Q. Yes.

A. Kingston Club proper?

Q. Kingston Club proper. By that you mean you are qualifying that you do not mean it was for the betting activities which are sometimes listed as Kingston Club activities? A. That is right.

Q. You mean this statement doesn't relate to your betting activities?

A. That is right. My commission activities, not my betting activities.

Q. When you use the term “Kingston Club” in your testimony, you are talking about Kingston Club income, and in talking about these schedules, are you talking about income from your betting activities?

A. My commission activities.

Q. Yes.

(Testimony of Lesly Cohen.)

A. The Kingston Club and the commission activities were two separate activities.

Q. And wherever the term "Kingston Club activities" is listed in these, in Mr. Calegari's report with respect to what you testified, you were not referring to your commission [160] activities; is that right? A. That would be correct.

Q. Your commission activities were something over and above and different from the Kingston Club? A. That is right.

Mr. Nyquist: Your Honor, I wish at this time, to be sure we have the record preserved, wish to offer in evidence the Petition, the Answer and the Reply as the next exhibit in order.

The Court: You are offering the petition for what purpose?

Mr. Nyquist: I understood from a remark your Honor made earlier that to protect the record I ought to offer it.

The Court: I didn't say that.

Mr. Nyquist: I gathered from a remark made earlier that you had.

The Court: The rule says that whatever is alleged in the pleading and not denied is admitted. The question of how you prove it is up to you. It seems rather better to me to introduce those items of the pleadings that were applicable into the record. I can't imagine you wanting to offer the Petition wholesale, or the Answer. Of course, the Answer is your own, or the Reply wholesale.

(Testimony of Lesly Cohen.)

Mr. Nyquist: I think it would keep the record down if I limited my offer. [161]

The Court: I think you want to offer what you intend to prove and for whatever purpose; if you want to offer the correctness of Mr. Cohen's petition, it is all right with me.

Mr. Nyquist: I am offering the Petition only to show that Mr. Cohen swore to certain statements. I am certainly not admitting the correctness of any statements therein.

The Court: Take your time and analyze it, if you want. I didn't think you meant it, but that is what you were apparently saying.

Mr. Nyquist: Let us take these items one at a time.

The Court: The witness has testified that he swore to the Petition. What is it about the Petition that you want to bring out that you haven't already brought out?

Mr. Nyquist: I think so far as the Petition is concerned I have brought it out. I will offer in evidence Paragraph 7-A of the Respondent's Answer, and will ask that it be stipulated that in the reply to the Respondent's Answer there is reply to all of Paragraph 7 except 7-A. There is no reply to 7-A.

Will you stipulate to that?

Mr. Sherwood: The record speaks for itself; whatever that says.

The Court: Let me see that.

(Testimony of Lesly Cohen.)

To shorten it up, you are offering Paragraph 7-A of [162] your Answer, which reads:

“Petitioner during the years 1948 to 1950, inclusive, and prior thereto, was engaged in various business activities, i.e., as a bookmaker and betting commissioner in the City of San Francisco, California, and elsewhere.”

And you are directing the Court’s attention, as I understand it, that no reply was made to subparagraph (a) of Paragraph 7 which I have just read into the record; is that right?

Mr. Nyquist: That is right.

Mr. Sherwood: We have not agreed to any admission of their own self-serving answer in evidence, if that is what you mean.

The Court: You are not agreeing to the correctness of subparagraph (a) except in so far as you didn’t deny it in your reply.

Mr. Sherwood: But we are taking no position on it at all. I don’t think the answer is any evidence or proof of anything.

The Court: Well, it is offered solely for the purpose of showing an allegation of fact which wasn’t denied.

Mr. Sherwood: That is right. It could be brought up in argument at any time, I take it.

The Court: Mr. Nyquist, I think partly because of my remark, you have offered the actual pleading in evidence, and the fact that it was not replied to. I just want to make sure counsel understands that. [163]

(Testimony of Lesly Cohen.)

Mr. Sherwood: I understand what he has done. I don't see the materiality of it. I think the answer speaks for itself.

The Court: I am not deciding anything, but what he is going to claim is that this petitioner was a bookmaker, among other things, and betting commissioner because he alleged it and you didn't deny it. It is up to counsel to look after themselves in their own way on it, and I am merely pointing it out.

So proceed, gentlemen.

Q. (By Mr. Nyquist): Do you have before you a copy of Exhibit 7? I call your attention to Exhibit a in Exhibit 7. There is an item in there, "Personal expenses to balance, year 1948, \$10,578."

Can you tell us what that item consists of?

A. Mr. Calegari probably can help me on it.

Q. I am asking you, if you know the answer?

A. No, I can't say that I know the answer.

Q. Did you give that figure to Mr. Calegari?

A. No.

Q. And is the same true of the other, similarly the two items for the two succeeding years on that same page?

The Court: What page is that?

The Witness: Exhibit A.

Mr. Nyquist: Exhibit A of Exhibit 7. [164]

The Court: You mean Schedule A?

Mr. Nyquist: It is called Exhibit A.

The Court: Yes, I see.

The Witness: No, I did not give it.

(Testimony of Lesly Cohen.)

Q. (By Mr. Nyquist): The figures to Mr. Calegari? A. No.

Q. What sort of things did your personal expenses consist of? Did you travel?

A. I never made a trip in approximately fourteen years.

Q. Did you go to Reno? A. Never.

Q. Give us a rough estimate of how much of your business was local and how much was out of town business?

A. I couldn't estimate that very well.

Q. Was your local business largely a cash business? A. I would say so.

Q. That is to say, people would come in, pay cash and you would pay out cash?

A. That is right.

Q. Whereas your out of town business was largely by check? A. Correct.

Q. Your out of town bettors, when they had a payment to make to you they would make it by check and you would remit by [165] check?

A. Correct.

Q. Whereas locally you would pay by cash or they would pay you by cash?

A. On the other hand, the local people on occasions where they paid cash I had to pay by check.

Q. But in general it was cash locally?

A. Correct.

Q. Check out of town? A. Correct.

The Court: I think if you will take your eye-glasses away from your mouth you will talk clearer.

(Testimony of Lesly Cohen.)

The Witness: Yes, your Honor.

Q. (By Mr. Nyquist): Did you ever tell Mr. Murton that all of your receipts didn't go into the bank account?

A. I never told him anything.

Q. Did you ever tell Revenue Agent Perenti that all your receipts didn't go into the bank account?

A. I don't believe I had conversation with Mr. Perenti.

Q. Did you ever tell Adrian that all your receipts didn't go into the bank account?

A. I never discussed it with Mr. Adrian.

Q. Did Mr. Adrian ever make a demand upon you for your books and records? [166]

A. A demand or a request?

Q. Let's say a request for your books and records?

A. Yes; he asked for them.

Q. And he handed you a letter from the Commissioner of Internal Revenue?

A. I don't recall the letter.

Q. Did you allow Mr. Adrian to examine any of your records?

A. I referred him to Mr. Lewis.

Q. I notice among your 1950 checks which you have identified as being in payment of amounts you owed on some of the wagering transactions, checks payable to a Myron Beck. Did you receive checks also from Myron Beck?

A. Myron Beck?

Q. Yes.

A. I knew a Mr. Beck. I can't recall the name Myron.

(Testimony of Lesly Cohen.)

Q. You can't recall the name Myron Beck?

A. I know Beck, yes. I don't recall the name Myron.

Q. You have identified a check payable to Myron Beck as being a payout of a bet?

A. That is right.

Q. That must be the man you are speaking about? A. Could be.

Q. Did you receive checks from him also during these years? A. I believe so. [167]

Q. And did these checks go into your bank account?

A. I don't recall what disposition was made of them.

Q. And as to—did you in the course of your business activity place bets with Harold's Club in Reno? A. That is Mr. Beck.

Q. That is also Mr. Beck?

A. That is Mr. Beck.

Q. Harold's Club is Mr. Beck?

A. What is Mr. Beck?

Q. Mr. Beck was what, an owner at Harold's Club?

A. He might have had an interest, but I think he operated the horserace business in the club.

Q. Then if you made a check payable to Harold's Club in the amount of \$608 on September 18, what would be the nature of that payment?

A. Horserace transaction.

Q. And would you also during the course of the year probably have received checks from Harold's Club or Mr. Beck? A. I would say so.

(Testimony of Lesly Cohen.)

Q. Do you know what disposition you had made of those checks?

A. Offhand I wouldn't know.

Q. You wouldn't know whether they go into your bank account or would not?

A. No. [168]

Q. I show you photostat copies of 11 money orders issued upon the Manufacturers Trust Company of New York, New York, in various sums, all papable to you and bearing your endorsement.

I have an understanding with counsel that the best evidence rule is waived here, that these photostat copies are accepted by him.

A. That is right.

Q. Are these checks, copies of checks received by you on or about the dates shown thereon?

A. I wouldn't know the dates but I recognize my signature. I can't deny that.

Q. And do you know whether or not these checks went into your bank account? A. No.

Q. At the Anglo-California?

A. I don't remember that.

The Court: Do you have many more questions from this witness?

Mr. Nyquist: I think I have five minutes more and should probably finish, your Honor.

The Court: I don't want to rush you. I just want to find out.

Q. (By Mr. Nyquist): I also show you two checks on the Hibernia Bank, [169] signed Joseph Bradway—correction. I show you photostatic copies

(Testimony of Lesly Cohen.)

of two signed checks payable to cash, bearing your endorsement.

Were these checks received by you?

A. My endorsement is on them. They must have.

Q. And finally I show you a check of the Horseshoe in the amount of \$5,500, dated March 6, 1950; this is a photostatic copy. Is that also your endorsement on that? A. Yes, sir.

Mr. Nyquist: I offer in evidence as a single exhibit this group of checks.

The Court: Any objection?

Mr. Sherwood: No objection.

The Clerk: Exhibit F.

(The document referred to was marked and received in evidence as Respondent's Exhibit F.)

Q. (By Mr. Nyquist): Just to save time I will refer to this entire group of checks which you have identified as being payouts made by you during the year 1950? A. Payments?

Q. Payments made by you in the year 1950, and I will ask you whether the parties to whom you made those payments were also parties who would from time to time during that year be making payments to you? [170]

A. In most cases I would say yes. Some of the names I wouldn't know anything about.

Q. Would you know in any particular instances whether payments you received would be deposited

(Testimony of Lesly Cohen.)

in your account or whether the checks would be cashed or used in some other way?

A. I couldn't positively say.

Q. Let us refer to these checks that you have received during these years in question, from various other men engaged in betting activities throughout the country. Would the individual checks which you received ordinarily be in payment of individual bets or would they ordinarily be settlements of account after a group of transactions which might go either way?

A. I would say settlements of accounts over a period of time.

Mr. Nyquist: I have no further questions of this witness.

The Court: I am going to recess for dinner in just a minute. Are you going to reoffer Schedule C-1? It seems to me that the only consistent thing I can do is to admit it subject to motion to strike and argument on the brief, so we will have all the schedules objected to open for argument and motion to strike on brief.

I have a note here that we will all be permitted to go out and come back again, except I am not going out at all. [171] I am notified that each person must sign in and the guard would like a list of the names of all persons who will return so will all of you who expect to come back give your name to Mr. Baird so he can give it to the guard.

How much time do you want for dinner, gentlemen? I don't know what facilities are here and it

(Testimony of Lesly Cohen.)

makes no difference to me because I am not going out.

Mr. Nyquist: Forty-five minutes.

The Court: Make it forty-five minutes. If you come in sooner you can let me know. I gather that is enough for both counsel. If you want longer, I will give you more time.

Mr. Nyquist: I wonder if we might have one witness out of order. I think we will dispose of him in five minutes?

The Court: You want to go ahead now?

Mr. Nyquist: If we could take five minutes.

The Court: I haven't any objection. Of course, Mr. Sherwood hasn't had his chance for redirect.

Mr. Sherwood: I have no objection, your Honor.

The Court: Are you going to have this witness back on redirect?

Mr. Sherwood: Yes; but if he wants to get rid of the witness I have no objection.

Mr. Nyquist: I would like to save this witness from having to stay away from his family for the evening.

The Court: All right. [172]

(Witness excused.)

Whereupon,

ROBERT K. LUND

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address?

The Witness: Robert K. Lund, Assistant Chief Intelligence Division, Internal Revenue Service, San Francisco, California.

The Clerk: Will you state your address?

The Witness: 262 Lake Drive, Berkeley 8, California.

Direct Examination

By Mr. Nyquist:

Q. Mr. Lund, did you ever investigate the affairs of Mr. Cohen?

A. No; I did not, personally.

Q. Did you ever make an investigation in which the books and records of Mr. Cohen became material to your investigation, or an object of your search?

A. I made inquiries about Mr. Cohen's books, yes, sir.

Q. Will you tell us when and where you made those inquiries?

A. On April 17, 1952, I went to Mr. John V. Lewis' office to inquire as to the availability of Mr. Cohen's betting [173] records, and also as to whether or not he would be available to testify regarding transactions he had had with the taxpayer who was under investigation. I asked Mr. Lewis

(Testimony of Robert K. Lund.)

about this matter, the availability of both the books and Mr. Cohen, and he stated that "I have all of Mr. Cohen's books in my office and I will think about it and let you know later."

Q. Did you receive any further word?

A. I have no independent recollection of ever receiving an answer to it. I may have but I have no recollection of it now.

Mr. Nyquist: No further questions of this witness.

Cross-Examination

By Mr. Sherwood:

Q. This investigation which you were conducting was of a taxpayer not Mr. Cohen?

A. That is right.

Q. And that was in the year 1952?

A. Yes.

Q. And as I recall it, Mr. Lund, in 1952, there was great activity in San Francisco in connection with matters involving commissioners and other people engaged in wagering?

A. Well, it was nationwide.

Q. There was a nationwide upheaval?

A. Yes, sir.

Q. And the law enforcement agencies such as the police [174] department and county governments and state attorney generals' offices were watching these investigations and in many cases were collaborating with them?

A. Well, I wouldn't say that was quite true, Mr.

(Testimony of Robert K. Lund.)

Sherwood. The Internal Revenue Service had its own program.

Q. I understand that but the evidence that was uncovered at that time was also pertinent to inquiries made by the Attorney General of California, for example?

A. Well, it might have been, but I have no personal knowledge of any inquiries they may have made. We didn't collaborate with the Attorney General or local law enforcement people. We were making income tax investigations.

Q. I seem to recall a great many releases made by the Attorney General's Crime Commission.

The Court: Where are we going, Mr. Sherwood?

Mr. Sherwood: We will try to remove any question about the fact that the records were not made available. I think Mr. Cohen has given the fact, but of course, these records they wanted might have been very dangerous for Mr. Cohen to have parted with.

The Court: They might have been.

Mr. Sherwood: Entirely apart from tax matters.

The Court: If you want to press along those lines.

Mr. Sherwood: I think it is unnecessary to go any further. [175]

The Court: Any redirect?

Mr. Nyquist: No redirect.

(Witness excused.)

Mr. Nyquist: I have one other witness who will

testify to the same thing. Maybe counsel is willing to stipulate to the same thing.

The Court: I guess you better put him on.

Mr. Nyquist: Mr. Doherty.

Whereupon,

WILLIAM J. DOHERTY

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows :

The Clerk: Will you please state your name and address?

The Witness: William J. Doherty, 336 Bonacin Avenue.

Direct Examination

By Mr. Nyquist:

Q. Your occupation?

A. Special Agent with the Internal Revenue.

Q. Did you at any time have an occasion to make a search for the books and records of Lesly Cohen?

A. Yes; I was assigned to the case in early 1953 and my group supervisor knew they were having trouble getting the records. He encountered me one day and said— [176]

Mr. Sherwood: Wait a minute. Is this a conversation between you and your group supervisor?

The Court: Mr. Doherty, you know perfectly well you are not supposed to testify to a conversation along those lines. Strike that answer. You can

(Testimony of William J. Doherty.)

start fresh with him, and you will answer such questions as are asked, and only what is asked. If counsel wants to ask you anything further, he will do so.

Go ahead.

Q. (By Mr. Nyquist): When were you assigned to this case? A. In early 1953.

Q. And what did you do with respect to the books of Lesly Cohen?

A. On October 7, 1953, I called Mr. Lewis, and I said to him that "in connection with your offer to make the records of Mr. Cohen available to our office now, Mr. Wilks told me you had promised to give them to us." He replied that Wilks was crazy, that he had never promised that we could ever see the records and we weren't going to see the records then either.

Q. Did you ever see the records? A. No.

Mr. Nyquist: No further questions.

Mr. Sherwood: No questions. [177]

The Court: You are excused.

(Witness excused.)

The Court: Anything further at the moment? I gather you will return in forty-five minutes then, which will be seven o'clock.

(Whereupon, a recess was taken until 7:00 o'clock p.m., of the same day.) [178]

Evening Session

(Court met, pursuant to the taking of the recess, at 7:00 o'clock p.m.)

The Court: Proceed.

Mr. Sherwood: The last two witnesses were taken out of order. Our rebuttal will be presented after the conclusion of the respondent's case, and we will call Mr. Cohen back to the stand to finish our case in chief.

The Court: Mr. Cohen, resume the stand.

Whereupon,

LESLY COHEN

the Petitioner herein, having previously been duly sworn, resumed the stand and testified further as follows:

Redirect Examination
(Resumed)

By Mr. Sherwood:

Q. Mr. Cohen, in answer to a question on cross-examination concerning keeping track of the transactions which you had as a betting commissioner, you stated, did you not, something about having them on a sheet?

I wonder if you would elaborate a little bit on that and tell the Court what these sheets were.

A. Well, I used what is termed as a master sheet in recording the individual transactions so that I could keep track of what was going on during the course of the day.

(Testimony of Lesly Cohen.)

Q. On a busy day, would there be a large number of [179] transactions on that sheet?

A. Approximately 100.

Q. And as I understand it, you might have one in a certain amount and you should have to balance that off with others of varying amounts so as to strike a balance? A. That is right.

Q. What happened to those sheets?

A. Well, they were just kept for reference purposes, maybe for one day or two days and destroyed.

Q. You heard Mr. Evje testify that he picked up certain memorandums concerning cash expenditures for expenses, did you?

A. Those were daily expenditures picked up at the end of each month, or the first of each month.

Q. Who wrote those memos?

A. I usually compiled them.

Q. On direct examination this afternoon, I think you identified Exhibit 10, which comprise three sheets, being the annual statement for 1948, 1949 and 1950; do you recall that you looked at them this afternoon? A. Yes.

Q. And I believe you also testified at that time that the data set forth thereon was true to your best knowledge? A. That is right.

Q. Then on cross-examination you made some sort of a distinction between the Kingston Club and the card game, and I [180] am wondering if you would care to explain that a little further; in other words, do you now wish to correct anything that you said on your cross-examination?

(Testimony of Lesly Cohen.)

A. I probably was confused by the question.

Q. What do you mean?

A. Well, the entire Kingston Club net figure was based on the annual report as presented by Mr. Murton.

Q. And when you testified this afternoon that the schedules prepared for you by Mr. Calegari contained information which you believe to be true, it did include the transactions of the betting commissioner's business as well as the card room?

A. Yes.

Q. And where these sheets refer to horses, that embraces the entire betting commissioner's activities? A. That is right.

Q. I take it that term "horses" was put in there in Mr. Coplin's time when the business was confined to horses? A. That is right.

Q. But in your case it covers all sorts of athletic events? A. That is right.

Q. Going back to some questions that were asked of you, some of them by the Court and some of them by both counsel regarding the actual mechanism of making these bets, and in [181] which you gave an illustration of A making a bet on one side and B making a bet on the other, in those cases would A and B have any direct contact with each other?

A. Definitely not.

Q. And in the event that A won and B lost, who actually paid the money that he had won?

A. I did.

(Testimony of Lesly Cohen.)

Q. Were there ever instances where you were unable to collect from the losing party?

A. Oh, certainly.

Q. And in that event did you pay the winner just the same?

A. Absolutely; that was my obligation.

Q. So that you were responsible for all of the commitments which you made even though you would not yourself be reimbursed by the loser?

A. That is right.

Q. Did that happen with any frequency during the time you operated the commissioner business at the Kingston Club?

A. Well, no, I watched my credits pretty carefully.

Q. Did you have any particularly large losses in any one of these three years?

A. Yes; in 1950 I sustained a couple severe losses.

Q. What were they?

A. Well, in round figures, I would say about \$25,000. [182]

Q. Spread over how many persons who owed you money? A. Two outstanding accounts.

Q. Could you tell us approximately what each one of those was in amount?

Mr. Nyquist: Objection, your Honor. This is inducing a new proceeding into issue; nothing in the pleading about bad debts. I think we are introducing a new type of deduction and new issue in here.

Mr. Sherwood: It is neither a new issue or a

(Testimony of Lesly Cohen.)

new deduction. It is simply an amplification of the accounting method used because, of course, the accounting method which Mr. Evje described would take this into account, so I am not claiming there is any new deduction, but I am trying to explain the evidence which is already introduced of the bank deposits and withdrawal, most of which has been introduced in the stipulation which was prepared by the Respondent. I think it is relevant.

The Court: I will overrule the objection.

The Witness: What was the question?

Q. (By Mr. Sherwood): I asked you to give the detail on those large bad accounts?

A. They were spread over the entire year, practically.

Q. What did each of them amount to in round figures? A. Separately? [183]

Q. Yes. A. I would say 14,000 and 10,000.

Q. And those sums represented amounts which you were, nevertheless, obliged to pay to the winner on various wagers? A. That is right.

Q. In regard to that petition which you signed, I call your attention to the statement in there which counsel read to you; where you said that you had maintained adequate books. At that time had anyone told you whether or not your books were adequate? A. No.

Q. Had Mr. Murton ever told you anything about them?

Mr. Nyquist: Objection, your Honor. These questions are based upon a mis-statement of the

(Testimony of Lesly Cohen.)

petition. He states that—he is talking about a petition that states he kept adequate books. That is not the way the statement in the petition was made.

Mr. Sherwood: I am referring to whatever statement you read to the witness, to save time. I didn't get the pleading.

The Court: The witness made it perfectly clear, I thought, that he claimed he kept adequate books as to the card room or card club and he didn't keep adequate records as to the betting commissioner's activities.

Mr. Sherwood: He stated that, but when he came back [184] after dinner, your Honor, he pointed out at that time that he was under a misapprehension in distinguishing the two activities because they were both embraced on those same exhibits, and he has reiterated his testimony that he believes the records in both cases are accurate.

The Court: I don't see any objection to him expressing a belief, whatever it may be worth.

Mr. Sherwood: I have forgotten the question. May I have it read?

(Question read.)

Q. (By Mr. Sherwood): On the basis of the conversation which you reported in your direct testimony that you had with Mr. Murton, did you believe that the records of the betting commissioner were adequate for tax purposes? A. I did.

Mr. Sherwood: That is all, your Honor.

(Testimony of Lesly Cohen.)

Recross-Examination

By Mr. Nyquist:

Q. Returning to this statement, in Paragraph II, of your petition, in which you say: "Petitioner caused true and complete books of account to be maintained in respect of all transactions of said Kingston Club, which books were kept by a reputable duly licensed public accountant with offices in San Francisco," did that statement, when you use the word [185] "Kingston Club" in that statement, did you have reference to your betting commissioner activities? A. At that time I believe so.

Q. You believe that you were referring to your betting commissioner activities, including them in the term "Kingston Club" when you state that you caused true and complete books of account to be maintained in respect of all transactions?

A. Right.

Q. And did you cause such true and complete books of account to be maintained with respect to all transactions?

A. What do you mean by the question, sir?

The Court: Mr. Cohen, you know perfectly well you didn't keep complete books on your betting commissioner work, don't you?

Mr. Cohen: I did not, your Honor, but I kept complete records as regarding the finances.

The Court: All right; go ahead. Counsel stated in the opening statement that because of the type

(Testimony of Lesly Cohen.)

of illegal business you were in, that you didn't keep a record of a great many things concerning it, and I don't know whether you testified to the same thing or not, but you didn't keep the names of the people that you dealt with, or the specific amounts with respect to any individual's longer than a day or so, did you?

The Witness: That is correct, your Honor. [186]

The Court: There wasn't any way anybody could look at your books and inquire whether a certain bet was made or wasn't made. You had no record of that kind?

The Witness: That is right.

Q. (By Mr. Nyquist): On this matter of daily cash expenditures, who made this expenditure of cash for operating the expenses of the Kingston Club? A. I did.

Q. What sort of memorandum would you prepare? A. Just a plain memorandum.

Q. To show money that you paid out in cash?

A. Correct.

Q. Where would you get this money?

A. Usually out of my funds.

Q. What funds? A. Revolving funds.

Q. And that revolving fund would later be built up from other cash receipts?

A. That is correct.

Q. So it would be maintained at its normal level?

A. Correct.

Q. Were any of these daily cash expenditures to members of the local police department?

(Testimony of Lesly Cohen.)

A. No, sir. [187]

Q. Were any expenditures to members of the local police department? A. No, sir.

Q. You talked about certain bets that you were unable to collect. Did you keep track of the amount of these? A. The total amount?

Q. Yes. A. Oh, yes.

Q. Did you show that in any figure that you turned over to Mr. Murton? A. No, sir.

Q. It wasn't shown on your income tax return?

A. No, sir.

Q. What did you say the total amount was?

A. Approximately \$25,000.

Q. For what years?

A. I believe it was either for '50 and '51 or for '50.

Q. '50 or '51 or is that the total?

A. Either '50 or '51, or '50 and '51.

The Court: You don't know which?

The Witness: No, sir. No, your Honor.

Q. (By Mr. Nyquist): And you say there were two individual bettors? A. Correct.

Q. Who were these two individuals? [188]

A. Mr. Bobby Evans of Portland, Oregon, and Joe Gillio, who was representing, or at least he said he was representing Corbetts in San Francisco.

Q. You received a number of checks from Bobby Evans throughout the year? A. I did.

Q. But at the end you say he still owed you money? A. Correct, sir.

(Testimony of Lesly Cohen.)

Q. What efforts did you make to collect this money?

A. I have contacted Bobby Evans by phone many times during the intervening years. He just hasn't got it financially. If he had it I am sure he would have met the obligation. As for Gillio, I just feel that whether or not he has it, he won't meet it anyway.

Q. What did you do in 1950 about collecting these amounts?

A. I made every effort possible to collect them.

Q. What do you know about the financial condition of these individuals in 1950?

A. I felt they were solvent or I wouldn't have extended the credit to them.

Mr. Nyquist: No further questions, your Honor.

Mr. Sherwood: No further questions, your Honor.

The Court: All right; you are excused.

(Witness excused.) [189]

The Court: Is that your case?

Mr. Sherwood: Is this our case? Yes, your Honor.

The Court: Very well. Mr. Nyquist?

Mr. Nyquist: I call Internal Revenue Agent Glenn Adrian.

Whereupon,

GLENN H. ADRIAN

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address.

The Witness: Glenn H. Adrian, 2341 Fifth Avenue, San Rafael.

Direct Examination

By Mr. Nyquist:

Q. What is your occupation?

A. Internal Revenue Agent.

Q. How long have you been a Revenue Agent?

A. Since 1941, with the exception of three and a half years spent in the Navy.

Q. And what is your educational background?

A. Graduate of Ben Franklin University in Washington, D. C.

Q. In what? A. Accounting. [190]

Q. Did you make an investigation of the income taxes of Lesly Cohen for the years 1948 through 1950? A. Yes, sir.

Q. Was the notice of deficiency on which the Petition was filed in this case based upon your examination? A. Yes.

Q. In making your investigation, did you examine the books and records of Lesly Cohen?

A. No, sir.

Q. Why not?

A. They weren't available to me.

(Testimony of Glenn H. Adrian.)

Q. What effort did you make to get them?

A. Well, I had the returns assigned to me for investigation and to the best of my memory I called Mr. Calegari whose name was on the returns. He wasn't in. I contacted Mr. Melvin Cohen, the brother of Lesly Cohen, and he advised me that he tried to get in touch with Lesly and that ended the conversation. To the best of my recollection I called Mr. Calegari about a week later and he advised me that Mr. John Lewis had all the books and records and that I was to deal with him in the future. This was in April of 1952. After several attempts I finally got hold of Mr. Lewis on the phone and advised him that I had the returns for 1948 and 1949 for pre-examination, and the 1945 for the original examination. He advised me that he understood that Mr. Cohen's books, or [191] returns had been audited for 1948 and 1949 and that he wouldn't show me any records in regard to them. I said, "Do you mean 1950 also?" He said, "Well, he would take a look at the records that he had and let you know." A week or so passed and after a few attempts I finally reached him on the phone again and he told me that he had looked at the records and he wouldn't show me anything.

Along some time in May, I, in conference with my group chief, caused a registered letter to be sent to Mr. Cohen asking that he appear in the office with his records.

Q. Did you obtain authorization from the Commissioner of Internal Revenue for re-examination

(Testimony of Glenn H. Adrian.)

of the years 1948 and 1949? A. Yes, sir.

Q. And did you advise Mr. Cohen that you had such authorization? A. Yes, sir.

Q. Did you furnish him with a copy of the Commissioner's letter of authorization?

A. Yes, sir.

Q. Did you request of Mr. Cohen his books and records for those years?

A. I caused to be sent to Mr. Cohen another letter in September of 1952 asking to explain why he hadn't appeared with his records from the prior registered letter sent to him. I received no answer. Mr. Lewis sometime after this, a week [192] or ten days in September, contacted my group chief and told him that at the termination of a case he presently had in court that he would contact me. I never heard from anyone after that and I subsequently submitted my report in October, 1952.

Q. How did you proceed with your examination in the absence of books and records?

A. Through the use of third party records.

Q. Where did you go and what did you do?

A. Well, I went to the Market-Ellis Branch of the Anglo-California National Bank, and there were schedules made of all the deposits that the taxpayer had made, and there were schedules drawn off as best as could be found in the bank's records of every deposit, deposit tag for 1948 and 1950.

Q. What records did you find at the bank?

A. The deposit tags, which showed the checks deposited and the identification of the issuing banks

(Testimony of Glenn H. Adrian.)

on there; there were no names, and the amount of the check, and the copies of the bank statements which were naturally sent by the bank to the taxpayer, and on which were shown the total deposits, and the checks written on the account. There were no names or identification at all.

Q. Is this Exhibit 5-E, which is part of the petition, the summary of the information obtained from the deposit tags at the bank?

A. Yes, sir. [193]

Q. What other information did you have in addition to the bank records?

A. Well, I received a lot of information from other Internal Revenue Agents offices throughout the United States which constituted photostats of checks which were paid or endorsed by Mr. Cohen.

Q. Are these some of the photostats of which you speak? A. Yes, sir.

Q. Have you read the stipulation of facts in this proceeding? A. Yes, sir.

Q. Is most of the material that you found covered by that stipulation of facts? A. Yes, sir.

Q. What did you do with this information once you obtained it?

A. As I mentioned a moment ago, there was a complete analysis made of the deposit tags by which the items making up the deposits were identified, and with these checks that I had I would check them against this schedule and determine whether the check had been deposited or undeposited, and I separated them into the different schedules, one

(Testimony of Glenn H. Adrian.)

showing the total deposited and the other showing which had been cashed by Mr. Cohen, but not deposited.

Q. And is that information reflected in the stipulation [194] of fact? A. Yes, sir.

Q. I show you a group of checks which are marked Exhibit F, and I ask whether you have, at my request, checked to determine whether any of those were deposited in Lesly Cohen's bank account?

A. I have checked and they are not deposited.

Q. That is, they were cashed but not put in the commercial account at the Anglo-California National Bank; is that right?

A. Well, they show that they are cashed and they show that they are not deposited.

Q. Were you able to locate all of the checks which were deposited in Lesly Cohen's commercial account during the years 1948 through 1950?

A. No, sir.

Q. Can you tell us approximately what percentage of the checks you were able to locate for the year 1948?

A. Of the checks which I had, which I received, which were deposited, I imagine I had one-fifth; from the records which could be checked by the facts stipulated to, approximately one-fifth.

Q. You found approximately one-fifth of the deposited checks? A. Yes, sir. [195]

Q. And for the year 1949, about what fraction?

A. Approximately 50%.

Q. Half of the deposited checks you located?

(Testimony of Glenn H. Adrian.)

A. Yes.

Q. My question was '49; and for the year 1950, approximately what percentage?

A. Approximately 50%.

Q. After you made this breakdown between the deposited and undeposited checks, what did you do with the figures?

A. I took the total deposits of that schedule which has been stipulated to and took the total and to that I added the undeposited checks.

Q. One moment; you say the total deposits which had been stipulated to. Let me ask you, did you have all of the checks that are in the stipulation at the time you made your report?

A. No, sir; some of those checks, quite a few, in fact, have been received by our office after my case was submitted in October, 1952. Some of those names were new to me. I never heard of them before.

Mr. Sherwood: I am not objecting, but to clarify my point, as I understand it, the first thing he said was he took the bank deposits; that is far as he got. He was going to say something more but you interrupted him, but all the bank deposits, I would assume, included checks, no matter where [196] he got them; is that right?

The Witness: Yes, sir; that is right.

Mr. Sherwood: Do you see my point? It didn't make any difference whether he had the checks before or after; he had all the bank accounts. Now

(Testimony of Glenn H. Adrian.)

he is going to add something, but we haven't got that far.

The Court: What you said is correct as to those that were deposited. Go ahead.

Q. (By Mr. Nyquist): What did you do with the information you then had as to deposited and undeposited checks?

A. Well, I took the deposited checks, as combined in that schedule which has been stipulated to, and to that I added the undeposited checks which I had verified against that schedule and found not to have been considered before, and then also I added to that the wins from the Film Row Club and totalled that up as to me known income, and that was the figure which was used in the computation of the tax in each of the years considered.

Mr. Sherwood: May I ask one question? When he says "deposited" does he mean all the deposits, including cash? He said checks.

Q. (By Mr. Nyquist): You mean all the deposits?

A. The deposits stipulated to, sir, which—in those [197] deposits in that schedule there are checks and cash and the schedule will show what it is.

Mr. Sherwood: You confined your statement to checks. It was the total deposit, checks and cash?

The Witness: Yes, sir.

Q. (By Mr. Nyquist): You mentioned the Film Row Club. Will you tell us what information you had about the Film Row Club?

(Testimony of Glenn H. Adrian.)

A. There was an examination made by our office of the Film Row Club, and during the examination there was given to the agent the records, and in the records were bets with Mr. Lesly Cohen, and the agent gave to me a transcript of the wins and losses, and I used that transcript, as I say. I took the wins and put them in my schedule as gross income or as income.

Q. And did you allow any of the losses as deductions? A. No, sir.

Q. Why was that?

A. Well, the taxpayer was on a cash basis, and he should substantiate his losses or payouts and there was no substantiation given me. I was refused the records, and I would gladly have considered them, but I had nothing to substantiate or allow losses on.

Q. Did you make a computation of Lesly Cohen's income for these years by the net worth method?

A. I considered it. [198]

Q. Did you do it? A. No, sir.

Q. Why?

Mr. Sherwood: I don't think that is revelant, why. The fact is he didn't do it. I object to it on that ground, your Honor.

Mr. Nyquist: The petition alleges that the Commissioner was completely arbitrary in his method of going at these things here, and I am trying to show why the Commissioner's representative did not use one method which Petitioner's counsel now urges or is trying to introduce evidence on.

(Testimony of Glenn H. Adrian.)

The Court: I will overrule the objection.

Q. (By Mr. Nyquist): Why did you not use the net worth method?

A. Well, taxpayer dealt in large sums of cash and I didn't feel that I could accurately determine a net worth with that in mind, and I had been refused the records and I would not know what was in the taxpayer's books or how he made his investments, and I didn't think I could accurately determine it.

Mr. Nyquist: No further questions.

Cross-Examination

By Mr. Sherwood:

Q. Do you have with you this schedule that you said was given to you by the investigating agent in the Film Row Club? [199]

A. I don't have it but it is a part of the file.

Q. From your file could you give us the figures, substantially?

A. In 1948 the wins were about \$62,000.

Q. Just a moment; what were the losses in that year?

A. I don't recall, sir.

Q. Do you have information from which you could give us that?

A. Yes, sir.

Q. Would you mind stepping down and getting it.

A. Yes, sir.

(Witness leaves stand.)

Q. Can you state now by refreshing your memory with the memorandum you have before you,

(Testimony of Glenn H. Adrian.)

what the schedules showed as to losses to the Film Row Club in 1948? A. \$79,075.

Q. And can you give—

A. For the accuracy of it, my information from this same schedule, I would like to give you the correct win figure, \$61,965.

Q. And can you give us corresponding figures for the year 1949?

A. The wins, \$63,500; the losses, \$65,912.50.

Q. Would you give us the figures for 1950?

A. That taxpayer refused to give his records to our [200] office and I don't have any figures on 1950.

Q. Then may I assume that you didn't add anything to the bank deposits and undeposited checks in 1950? A. Yes, sir.

Q. That was a very awkward question I asked. The fact is you did not add anything to the undeposited or the deposited amounts in the bank on the undeposited checks for 1950?

A. No, sir; I took no action at all on his activity with the Film Row Club in 1950.

Q. You stated, I believe, that you prepared the deficiency notice, the 90-day letter?

A. I submitted a report. I presume those figures were from my report.

Q. And wasn't there also a jeopardy assessment levied prior to that time?

A. I believe that it was practically at the same time; I don't know. That is another department.

Q. To clear up that matter that you were talking about concerning checks which cropped up after

(Testimony of Glenn H. Adrian.)

the deficiency notice was issued, in so far as those checks were included in the bank deposit, you had already taken them into account? A. Yes, sir.

Q. And were there any substantial number of checks that cropped up which were cashed instead of deposited subsequent to the issuance of the deficiency notice? [201]

A. Yes, sir; there were quite a few. I don't have the figures at my fingertips. I don't think I can tell you. They are in some of the schedules I think the attorney has.

Q. In any event, they are all included in the stipulation? A. Yes, sir.

Mr. Nyquist: In the stipulation or in the checks that are entered as an exhibit?

Mr. Sherwood: Yes; I will amend it to include the checks that counsel just put in evidence.

Q. (By Mr. Sherwood): When you submitted your report in 1952, was it— A. Yes.

Q. —you knew that the records of the Film Row Club showed that Mr. Cohen had sustained a net loss in that operation?

A. Taking these figures, if every bet was carried to a conclusion, yes, sir.

Q. And you had just as much reason to give good faith, believe the figures as to the losses as you did to the wins, did you not?

A. Sir, may I answer that in this way?

Q. Just answer it yes or no; then you may explain it.

(Testimony of Glenn H. Adrian.)

A. Would you repeat the question?

Q. You had just as much reason to think that the Film [202] Row Club records were accurate as to wins as they were to losses and vice versa?

A. Yes, sir.

Q. Going back to your conversation with Mr. Lewis concerning the records, which I think you have placed in April of 1952, isn't it a fact that at that time Mr. Lewis told you that he hadn't had an opportunity to study the records, was not familiar with the contents and would not give any client's records to the Revenue Service until he had first studied the records to ascertain what they contained?

A. No, sir; I stated exactly a moment ago——

Q. Isn't that the substance of the conversation?

A. No, sir; I would only answer it in the way I answered it before.

Q. Did he at any subsequent conversation with you tell you that he had given all of the records that he had to Mr. Calegari, that when Mr. Calegari had finished an analysis of them he would then let you know about it and submit to you the statement which Mr. Calegari was going to prepare?

A. The first time I met Mr. Lewis personally I was—that was in 1954.

Q. Was Mr. Calegari present at that time?

A. I don't know, sir, whether the first time I met Mr. Lewis was in the appellate office or in his own office. If it were in his own office Mr. Calegari was not there at that [203] time.

(Testimony of Glenn H. Adrian.)

Q. And if it was the other office?

A. He wasn't there that time either. There was a time I met Mr. Lewis with Mr. Calegari in Mr. Lewis' office. It seems to me it was subsequent to the first time that I met him personally.

Q. On one occasion you did meet Mr. Calegari in Mr. Lewis' office? A. Yes, sir.

Q. And at that time were you told that Mr. Calegari either had made or was going to make a complete study and analysis of the available records? A. Yes, sir.

Q. And at that time or subsequently was the report given to you, two copies, in fact?

A. Yes, sir.

Q. And were you also told that you were welcome to use any of the material that Mr. Calegari had which he had used in the compilation of this report? A. In 1954, yes.

Q. In the course of making this investigation, were you aware of the fact that Mr. Cohen was a betting commissioner? A. Yes, sir.

Q. And did you make any allowance in making your report for any sums which he might have had to pay out from the bank [204] deposits or the checks which were cashed without being deposited?

A. As such I made no adjustment.

The Court: What do you mean "as such"?

The Witness: Because, your Honor—

The Court: Did you make any adjustment in any way?

The Witness: He asked me if I made any allow-

(Testimony of Glenn H. Adrian.)

ance, and I say as such I did not, but I may have made an allowance in this manner. The amounts received indicated many times pennies running into 25, 50 or 75, and that indicated to me that it must have been a settlement of something, and maybe the payoff had been allowed on the amount I included on income.

Q. (By Mr. Sherwood): That was your conjecture? A. Yes, sir.

The Court: Broadly speaking you didn't allow any payout?

The Witness: No, sir. I would have been glad to if I could have had some substantiation. There was no substantiation and I didn't.

Q. (By Mr. Sherwood): You have today in Court examined the checks which are on the table in front of you there? A. Yes, sir.

Q. Which embraces payouts from the bank account for the [205] year 1950, commencing about February 1st? A. Yes, sir.

Q. Is there anything that you have uncovered in your investigation that would lead you to believe that the same pattern would not develop if we had the bank records for 1948, and 1949?

Mr. Nyquist: Objected to as calling for a conclusion of this witness. He didn't have these checks before him at the time he made his examination. His examination was not based on these checks and therefore this type of conclusion is a conclusion that might be proper for the Court to draw. but not necessarily in conclusion for this witness.

(Testimony of Glenn H. Adrian.)

The Court: I will have to hear the last two questions and answers prior to the objection.

(Questions and answers read.)

Mr. Nyquist: I call the Court's attention to the fact that these checks and records, and so forth, of which he speaks are not material, that were submitted to Mr. Adrian at the time Mr. Adrian made the determination on which the 90-day letter is based.

The Court: He asked him whether the pattern is the same. He asked him whether there was anything to indicate that it would not be the same.

Mr. Nyquist: Asking him for an opinion.

The Court: He is asking whether this witness has [206] found anything. I would like the question to be rephrased, Mr. Sherwood, if you would be willing to do it. I am not quite sure that it is clear in my own mind what you are asking for. First of all, the pattern as to what?

Mr. Sherwood: The withdrawal of funds from the bank account.

Q. (By Mr. Sherwood): Perhaps I can get at it this way: You did, I believe, testify that you had received from the bank all of the bank statements for the entire three years in question?

A. Yes, sir; I examined them on their premises. I didn't have them in my possession.

Q. You didn't photostat them?

A. No, sir.

Q. And to refresh your memory, I will show you bank statements for one month, which is evidence as

(Testimony of Glenn H. Adrian.)

Exhibit 11. You will recall that is for the month preceding the checks about which we have just been discussing? A. Yes, sir.

Q. When you examined the bank statements at the bank, isn't it true that the same type of withdrawal, same general pattern appeared on all of the statements, for all three years?

A. I suppose it did. There is no name here, no identification; there is nothing to lend any credence as to what they are for or that they are productions. I imagine that the [207] statements have lots of figures like this on them.

Q. And from your general investigation you are aware of the fact that a betting commissioner necessarily has to pay out money?

A. A betting commissioner, yes, sir.

Mr. Sherwood: That is all.

Redirect Examination

Q. (By Mr. Nyquist): Mr. Adrian, on cross-examination the subject was brought up of a meeting with Mr. Lewis on Mr. Calegari in which you were given a copy of a report of Mr. Calegari and were told that you could have access to certain records? A. Yes, sir.

Q. Did this meeting take place in the course of your investigation of this case? A. No, sir.

Q. Did it take place subsequent to the issuance of the 90-day letter? A. Yes, sir.

Q. Was that at the time the case was before the appellate staff? A. Yes, sir.

Q. And you were called upon by the appellate

(Testimony of Glenn H. Adrian.)

staff to obtain additional factual information at that time? A. Yes, sir. [208]

Q. There has been some discussion of the checks which are not in evidence but are on the table there, checks for the year 1950, which the witness testified represented payments. Did you have access to those checks at the time you made your examination? A. No, sir.

Q. Did you have access to any of the taxpayer's records? A. No, sir.

Q. The point has been brought up that you include the receipts from the Film Row Club, rather, you included the wins from the Film Row Club in your receipts as you determined them, but you did not allow deductions for losses at the Film Row Club.

Have you any basis for making a distinction between the two types of transactions?

A. Well, the wins would presumably have been included and the cash payments which would have been made on those which were local bettors, as far as I could determine, were not a part of my records. I had no way to substantiate them, and it is not the policy to allow a deduction or a payment until it can be substantiated or determined to be legal and legitimate expense.

Q. Did you have any reason to believe that Mr. Cohen would be able to substantiate that production if it were properly allowable when the time came? [209]

A. I was told he had complete records and they

were in the hands of his attorney and I imagined that would come about in due course.

Mr. Nyquist: That is all.

Mr. Sherwood: No further questions.

The Court: The witness is excused.

(Witness excused.)

Mr. Nyquist: Respondent rests, your Honor.

Mr. Sherwood: That concludes the Petitioner's case, your Honor.

The Court: How much time do you want for briefs? Incidentally, I don't know whether it would save time or not, but sometimes it does in a complicated case. Are counsel satisfied to have seriatim briefs or do you want simultaneous briefs?

Mr. Sherwood: I should think seriatim would possibly be better in this case.

The Court: Do you have any objection?

Mr. Nyquist: I have no objection to seriatim briefs.

The Court: How much time do you want for your opening brief?

Mr. Sherwood: Sixty days, your Honor.

Mr. Nyquist: I would like sixty days, your Honor.

The Court: How much do you want for reply?

Mr. Sherwood: Thirty. [210]

The Court: Very well. Is there anything further, gentlemen?

Mr. Sherwood: Nothing further.

Mr. Nyquist: Nothing further.

The Clerk: Those dates are Petitioner's briefs on or before May 28; Respondent's answering brief

on, or before May 28—on or before July 27, and Petitioner's reply on or before August 27, 1956.

The Court: That is all, then.

(Whereupon, at 8:30 o'clock p.m., the hearing was concluded.)

Filed April 5, 1956. [211]

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Held:

1. That, where petitioner received almost all of his income from the illegal operation of a "betting commissioner" enterprise, and kept no permanent records of his transactions in that capacity, respondent's use of the bank deposit method in determining petitioner's income was not arbitrary or invalid.

2. That certain losses from gambling are to be allowed to the extent of gambling gains.

3. That petitioner understated taxable income on his returns for each of the years 1948, 1949 and 1950. Amounts of understatements determined.

4. That a part of the deficiency in each of the years 1948 through 1950, inclusive, was due to fraud with intent to exade taxes.

JOHN V. LEWIS, ESQ., and
CLYDE C. SHERWOOD, ESQ.,

For the Petitioner.

CHARLES W. NYQUIST, ESQ.,

For the Respondent.

[Seal]

Fisher, Judge: This proceeding involves deficiencies in income tax and additions to tax determined against petitioner as follows:

Year	Deficiency	Sec. 293(b) Addition to Tax
1948	\$ 538,911.40	\$269,455.70
1949	426,038.44	213,019.22
1950	228,561.34	114,280.67
	\$1,193,511.18	\$596,755.59
Total		

The issues presented for our consideration are:

(a) whether respondent's use of the bank deposit method was justified; (b) whether certain losses from gambling are to allowed to the extent of gambling gains, (c) whether, and to what extent, petitioner omitted taxable income from his return for each of the years 1948, 1949 and 1950; and (d) whether any part of the deficiency for each of the years in question is due to fraud with intent to evade tax.

Findings of Fact

Some of the facts are stipulated and to the extent so stipulated are incorporated herein by reference.

Petitioner, Lesly Cohen, during the taxable years in controversy herein, resided in San Francisco, California, and was unmarried. Petitioner filed his individual tax returns for the calendar years 1948

through 1950, inclusive, on a cash basis with the then collector of internal revenue for the first district of San Francisco, California.

Lesly was born and educated in San Francisco. He worked on a local newspaper, the San Francisco Bulletin, as a copy boy, and eventually became a sports writer and member of the sports staff. About 1934, when the Bulletin was sold to another publisher, petitioner became a free-lance writer on sports subjects, editing boxing magazines and doing publicity work for various athletic events.

During the taxable years in question, petitioner lived modestly in his mother's home with two brothers and two sisters.

During World War II, Lesly was inducted into the United States Army. Upon his discharge, he returned to California and soon thereafter became acquainted with Coplin who owned and operated the Kingston Club (111 Ellis Street), in San Francisco. A "card room" was maintained as part of the club's operations. The same premises were used by Coplin for his "betting commissioner" business, which consisted largely of placing bets on horse races on a commissioner basis. The latter venture was in violation of both State and local law. Coplin, desirous of expending his gambling activities to embrace other athletic events, invited petitioner to join his betting commissioner enterprise as a limited partner.

In the latter part of 1947, Coplin died, and about January, 1948, Lesly took over the operation of the

Kingston Club. Thereafter, until the latter part of 1951, when the Federal Gambling Stamp Tax law was put into effect, Lesly operated the club's card room and betting commissioner activities as sole proprietor. During the years 1948, 1949 and 1950, Lesly's activities as betting commissioner included not only horse racing, but other sports events. He was unable to estimate what proportion of the bets handled by him grew out of horse racing and what out of other sports events. Petitioner's activities as betting commissioner, and his operation of the card room were his only income-producing activities during the years in question, other than a small amount of income derived from investments in securities with his brother Herbert. In his personal gambling activity at the Film Row Club, his losses exceeded his gains. The gains and losses from his limited activities as bookmaker about balanced each other.

Petitioner's primary function as betting commissioner was to obtain opposite parties to a wager, receiving for his services a "commission" or fixed percentage of the amount involved in the wager. Ordinarily, Lesly would quote prevailing odds on horse races and other athletic events and if a customer wished to make a wager, petitioner would attempt to locate others to accept or "cover the bet" in the same amount. Normally, petitioner did not accept a wager as "placed" until he had found some other individual to "lay off" the other side of the same event. When petitioner was able to "lay off" the entire amount of the bet, petitioner's profit

or loss would not depend upon the outcome of the event, but would be a fixed percentage or "commission" of the total wager, which petitioner retained on each bet. When able to do so, petitioner would lay off the bet with one or more of his own local customers. When this could not be accomplished, he would lay off or cover the bet with other betting commissioners in the San Francisco Bay area and in other cities. He would not bring the customers betting on opposite sides of the same transaction into personal contact so that they could bet with each other. When Lesly located a client willing to accept the other side of a bet, he would confirm acceptance of the wager by telephone. Lesly was personally responsible for the collection of all betting commitments which he made, and had to pay the winner even if he was unable to collect from the loser. Petitioner watched his credits closely.

The commission to petitioner on bets handled for his own customers was 5 per cent on each bet handled by him, except that on horse racing bets only the loser paid a commission. These commissions were not split. On bets laid off with other betting commissioners, the commission was usually split, half going to petitioner. At times, he found it necessary to waive his entire commission in order to get the bet laid off with another betting commissioner.

Occasionally, through miscalculations, on petitioner's part, or other unforeseen circumstances, he accepted a bet and could not arrange to lay it off. He then found it necessary to carry the other part

of the bet. On these occasions, he acted as bookmaker to the extent that he himself carried the bet. Except for such occasional instances, he did not carry any part of the bet himself.

Petitioner's betting commissioner enterprise was operated almost entirely on a credit basis. Comparatively insubstantial amounts of money were actually posted with petitioner prior to the happening of the event which determined the wager. Normally petitioner collected cash from local bettors and paid local winners in cash. Cash settlements were made with local customers following the happening of the sporting event. Settlements with other commissioners in the San Francisco area were likewise mainly in cash. Transactions with out-of-town betting commissioners were generally settled at periodic intervals by check. The periods varied, and included settlements on a daily, weekly or monthly basis, or when the account reached a certain fixed sum in favor of petitioner or the out-of-town broker. Such settlements were in effect the balancing of accounts between petitioner and out-of-town betting commissioners. They usually represented the net amount due from a number of bets rather than a single bet. When it was necessary for petitioner to remit to an out-of-town broker to settle an account, petitioner usually sent his own personal check. Occasionally he was required to send cashier's checks. Petitioner was unable to estimate what proportion of his betting commissioner transactions were with out-of-town brokers. The handling of bets of local

customers as betting commissioner on a commission basis was a substantial part of petitioner's business.

Petitioner maintained a "revolving fund" of about \$3,000 in cash, which he used in making pay outs to local winners. Checks, most of which were received from out-of-town brokers, were either deposited in petitioner's commercial bank account or were endorsed and transferred, or cashed by petitioner. The only cash deposits in petitioner's commercial bank account during the years in question were, in the aggregate, as follows: 1948-\$430; 1949-\$8,470; 1950-\$13,955. Petitioner received cash from local bettors far in excess of the foregoing amounts in each of said respective years. His records of cash transactions as betting commissioner were kept only a few days until settlement was made. He never furnished to his accountant any records of his cash transactions or cash commissions received as betting commissioner. In preparing data for petitioner's income tax returns for the years in question, neither the accountant who assembled the data nor the accountant who prepared the returns from said data took into consideration any undeposited cash.

Throughout the years 1948, 1949 and 1950, petitioner maintained a commercial bank account in the name of "Les Cohen" at the Market-Ellis Branch of the Anglo-California National Bank, San Francisco, California, where he deposited funds relating primarily to his activities as betting commissioner. The total deposits to petitioner's commercial ac-

count in said bank for each of the years involved herein were in the following amounts:

Year	Amounts
1948	\$508,384.23
1949	404,118.69
1950	283,129.80

Said deposits largely represented receipts from other betting commissioners in settlement of accounts.

The foregoing deposits consisted almost entirely of checks. During the entire three-year period in question the total amount of cash included in said deposits (detailed supra by years) was less than \$25,000. Deposits totaling \$2,905 were made to said account on January 3, 1951.

During each of the years in controversy, petitioner received a large number of checks payable to "Les Cohen" which were endorsed by him but not deposited. The total amounts thereof and the respective years in which received were as follows: 1948-\$120,974.75; 1949-\$107,712; 1950-\$22,613.75. These undeposited checks likewise largely represented settlement of accounts.

Petitioner made payments by check in the settlement of accounts with out-of-town bettors totaling \$292,283.46 in the year 1950.¹

¹Petitioner, in his proposed Finding No. 50, and respondent, in his proposed Finding No. 83, take the position in effect that payments in unspecified amounts were made under similar circumstances in 1948 and 1949.

During the taxable years in question, petitioner did not maintain any permanent or detailed records or formal books reflecting gross commissions or gross receipts and disbursements from his betting commissioner activities. Petitioner was apprehensive that the possession of such records would be both incriminating to him and embarrassing to his customers if they fell into the hands of the law enforcement officers. For his own reference purposes, however, he kept a daily "master sheet" at the Kingston Club setting forth the transactions which he handled as betting commissioner. On a busy day, approximately 100 wagers were recorded thereon. After a day or two, when the master sheets had served their immediate purpose, they were destroyed to avoid possible seizure and use as evidence by police authorities. The effect of such destruction was likewise to render it impossible to make an accurate determination of the amount of his commissions received as betting commissioner. No record of such commissions was maintained by petitioner.

Petitioner retained George T. Murton (formerly the accountant for the Kingston Club during the years Coplin operated the club) to maintain its records, and Murton, or Evje, an accountant in Murton's firm, performed such service for petitioner during the years in question.

Murton's procedure was to go to the Kingston Club at least once a month and take off the record of income and disbursements from the card room. He also collected memorandum sheets upon which

the petitioner had noted daily cash expenditures. Receipts or paid bills were usually attached.

Murton took the bank statements and canceled checks and reconciled the bank statements with the check book stubs.

The books of account of the card room were either used at the card room by Murton or taken to his office and returned to the card room where they were kept.

The bank statements, canceled checks, and memoranda of cash expenditures were kept by Murton either at his home or in his office.

Murton compiled the results of his accounting work in a so-called ledger which was actually a compilation on columnar work sheets.

Murton's method of arriving at petitioner's gross income at the end of each year was as follows: He subtracted the amount in the bank at the beginning of the year from the amount in the bank at the end of the year. He then added to the net increase or decrease in the bank balance all of the expenses of the business and all of the withdrawals made by or for the petitioner. The result was considered petitioner's gross income from the Kingston Club.

The accountants disregarded cash receipts (other than those deposited and reflected in the bank balance) and also disregarded cash payouts except those payouts substantiated by a memorandum from petitioner. This was done on the theory that the \$3,000

revolving fund remained approximately the same throughout the period.

From the gross income thus arrived at Murton would deduct the petitioner's deductible expenses.

Petitioner did not inform Murton that he received a substantial amount of checks in each of the years in question in connection with his business as betting commissioner which he endorsed but did not deposit.

For about five months in 1950, while Murton was ill, Evje acted in his place and followed the same methods. Evje never saw any books recording cash receipts or betting records relating to petitioner's activities as betting commissioner. Murton died some time in 1951.

All business expenses listed on Murton's summaries and claimed as deductions on petitioner's returns were allowed by respondent.

Annual summary sheets were prepared by Murton and furnished to petitioner and mailed to Calegari, a certified public accountant who prepared petitioner's income tax returns. The summary sheets for the three years here involved were furnished by Murton to Calegari and were used by the latter in the preparation of said income tax returns. Calegari did not keep any books or records for the Kingston Club operations or for any of petitioner's betting commissioner activities. The only records maintained by Calegari relating to petitioner's financial affairs was a set of books for Lesly's in-

vestment in various stocks and bonds, which he held as a joint venturer or partner with his brother Herbert.

In the preparation of petitioner's income tax returns for the years in question, Calegari was not given access to any books or records that may have been maintained with respect to the Kingston Club or for any of petitioner's betting activities. In preparing petitioner's income tax returns, Calegari relied on the annual summary sheets and profit and loss statements of the Kingston Club operations, which were sent to him by Murton.

About the end of 1950, petitioner's Federal income tax returns for the years 1948 and 1949 were audited by Internal Revenue Agent Parenti. The bank statements, cancelled checks and memoranda of cash expenditures referred to above, used in the preparation of the summary sheets for 1948 and 1949 by Murton, had been kept by the latter either at his home or in his office, and were made available to Parenti.

Parenti based his examination of petitioner's returns for 1948 and 1949 entirely on information and data furnished by Evje of Murton's office. After Parenti audited petitioner's returns for the years 1948 and 1949, he prepared and filed a report indicating deficiencies as follows: 1948-\$5,505.67; 1949-\$4,689.23.

At the time of the trial in the instant case, the bank statements and cancelled checks for the years

1948 and 1949 could not be found. Petitioner was able to produce only his cancelled checks for the last 11 months of 1950 and bank statements for the year 1950.

In 1952, Internal Revenue Agent Glenn Adrian conducted an original examination of petitioner's return for 1950 and a re-examination of his 1948 and 1949 returns. At this time there was a nation-wide investigation of betting commissioners and others engaged in gambling activities. As a result of this drive, Adrian had acquired, at the time of his investigation, photostats of checks paid to or endorsed by "Les Cohen," which had been received from other revenue agents' offices throughout the United States. Many of said checks had been endorsed and cashed by petitioner and had not been deposited in his commercial bank account. This information had not been available at the time of Parenti's examination.

Adrain obtained authorization from the Commissioner of Internal Revenue for a re-examination of petitioner's returns for 1948 and 1949, and a copy of said letter was furnished to petitioner. At the beginning of his examination, Adrian contacted Caligari and was advised by him that petitioner's attorney had all of petitioner's existing books and records. Later, an agent of the Intelligence Division of the Internal Revenue Service communicated with petitioner's attorney and was informed that the attorney had all of Cohen's books in his office. In May, 1952, Adrian caused a registered letter to be sent to peti-

tioner requesting that he produce his records, and a follow-up letter was sent to petitioner in September of 1952. Petitioner neither answered the letters nor produced his books and records. Thereafter, Adrian contacted petitioner's attorney who informed the agent that he would look at the records in his possession and would let Adrian know whether he could see them. Later the attorney informed Adrian that he had looked at the records and that he would not show Adrian anything.

Adrian proceeded to make his audit on the basis of third-party records to the extent that they were available. The available records were (1) bank deposit tags which showed dates and amounts of deposits and a number identifying the banks on which the deposited checks were drawn, but no names identifying the makers of the checks; (2) copies of bank statements of petitioner's accounts showing total deposits, and amounts and dates of payment of checks drawn on the account, but without names or other identification of payees; (3) photostatic copies of checks payable to Les Cohen obtained from other internal revenue agents' offices, and (4) a transcript of an account on the books of the Film Row Club showing petitioner's wins and losses from personal bets at that club.

Petitioner's wins and losses from gambling at the Film Row Club were as follows:

Year	Amount Won	Amount Lost
1948	\$61,695.00	\$79,075.00
1949	63,500.00	69,912.50

Respondent computed petitioner's taxable income for the years in question by the so-called bank deposit method. He determined that all monies deposited in the commercial bank and all checks received and endorsed but not so deposited (to the extent he had knowledge of them at the time the statutory notice was mailed) and all wins from the Film Row Club constituted income. Because of lack of substantiation, no deductions were allowed for pay outs or losses. None of the deductions claimed on petitioner's returns were disallowed.

Revenue Agent Adrian did not attempt to compute petitioner's net income by the so-called net worth method because petitioner dealt in large sums of cash and the agent did not feel that he could accurately determine net worth for that reason and also because, having been refused petitioner's books, he would not know how petitioner made his investments.

In petitioner's tax returns for 1948 through 1950, inclusive, on Schedule C, page 2 (profit or loss from business), the nature of the business was stated to be "brokerage."

Gross profits (listed as total receipts) from the Kingston Club operations are reported on petitioner's tax returns for the years 1948 and 1949 in the amounts of \$56,795.13 and \$66,274.91, respectively. On petitioner's original income tax return for the year 1950, he reported gross profit (listed as total receipts) from Kingston Club in the amount of \$1,836.28, and a net loss of \$26,687.91. On July

28, 1954, petitioner filed an amended return for the the year 1950 on which he reported gross income (listed as total receipts) from Kingston Club of \$8, 207.71 and a net loss of \$15,125.75.

During the years involved herein, Lesly had a safe deposit box at the Bank of America, Day and Night Branch.

During each of the taxable years in question, petitioner received substantial commissions in cash from local customers. His settlements with local betting commissioners were almost entirely in cash, and reflected his share of commissions.

Petitioner's gross income from his activities as betting commissioner and the operation of the Kingston Club card room for the respective years in question did not exceed the following: 1948-\$167,000; 1949-\$145,000; 1950-\$108,000.

Petitioner, in his income tax returns for each of the years in question, substantially understated income from his activities as betting commissioner and the operation of the Kingston Club card room.

A part of the deficiency for each of the years involved was due to fraud on the part of petitioner with intent to evade taxes within the meaning of section 293(b).

Opinion

Respondent's Determination Not Arbitrary

Respondent determined deficiencies herein by treating as income for each of the years 1948

through 1950, inclusive, the full amounts of bank deposits made by petitioner to his checking account, certain undeposited checks received by him in each of said years which were cashed or endorsed and transferred by him to others, plus winnings (without allowing losses) by petitioner from gambling at the Film Row Club in the years 1948 and 1949. Part of the deficiency for the year 1948 represents interest in the amount of \$159.12, which petitioner received in connection with a refund of Federal income tax, and which was not included in his reported income for that year. This item is not in dispute.

It is conceded that petitioner carried on an extensive business during the years in question as a betting commissioner, much of which was handled by cash transactions. It is also conceded that he maintained no records of commissions earned, bets placed, receipts (including cash) or pay outs (also including cash). Under the circumstances, we have no doubt that respondent was justified in making his determinations on the basis of the bank deposit method.

In *Doll v. Glenn*, 231 F. 2d 186 (C.A. 6, 1956), the Court said, in part (p. 188):

In the absence of the books and records of the Doll Lumber Company, the Commissioner was justified in treating the deposits in the bank account of H. A. Doll as gross income with the burden resting upon the taxpayer to

show what amounts, if any, were nontaxable income, and what deductions, if any, should be properly credited against it. *Hoefle v. Commissioner*, 6 Cir., 114 F. 2d 713; *Hague Estate v. Commissioner*, 2 Cir., 132 F. 2d 775, 777-778, certiorari denied 318 U.S. 787, 63 S. Ct. 983, 87 L.Ed. 1154; *Goe v. Commissioner*, 3 Cir., 198 F. 2d 851, certiorari denied 344 U.S. 897, 73 S. Ct. 277, 97 L.Ed. 693; *Leonard B. Willits*, 36 B.T.A. 294, 297; * * *

See also *Fada Gobins*, 18 T.C. 1159, 1168 (1952), affd. per curiam 217 F. 2d 952 (C.A. 9, 1954); *Sterns v. Commissioner*, 235 F. 2d 584 (C.A. 9, 1956), affirming a Tax Court Memorandum Opinion.

Petitioner complains that neither he nor his counsel ever knew what information was the basis of respondent's determination until almost the close of the trial. If petitioner or his counsel deemed such knowledge significant to the preparation of the case, a motion should have been filed to require respondent to "file a further and better statement of the nature of his claim" under the provisions of Rule 17(c)(1) of this Court. Petitioner's brief argues that he was unaware, until the agent testified, that respondent had added to income the wins at Film Row Club, but had made no allowance for losses. (See discussion, *infra*.) The agent testified as to the amount of the losses, as well as the gains, however, and we have allowed the losses to the extent of the

gains (see *infra*). We may add that petitioner made no motion to hold the record open for the production of additional evidence on this issue on the ground of surprise. We are unaware of any prejudice to petitioner arising out of the circumstances alluded to in this paragraph. In any event, no steps have been taken by petitioner to remedy such prejudice if, by any chance, it existed.

Petitioner's fundamental objection, however, is to the effect that respondent's determination was arbitrary and without rational foundation. Petitioner urges this view in two respects. The first is that respondent's determination was arbitrary because he included all gains from gambling at the Film Row Club as income and allowed no losses as balancing deductions. While, as will appear *infra*, we hold that Film Row Club losses are to be allowed to the extent of Film Row Club gains, it does not follow that respondent was arbitrary in refusing to do likewise. The agent's testimony explaining the basis for the statutory notice (which is the only evidence in the record in relation thereto) is to the effect that losses were disallowed because they were unsubstantiated, and also because taxpayer was on the cash basis and, assuming the losses were paid, the year or years of payment had not been shown. We think both views are tenable. It is clear that respondent, in the exercise of his judgment in making his statutory determination, may properly place the burden on the taxpayer of establishing all of the elements

upon which the right to deductions is based. See *Helvering v. Taylor*, 293 U.S. 507 (1935); *Burnet v. Houston*, 283 U.S. 223 (1931); *Doll v. Glenn*, *supra*. A holding by this Court, on the record before us, disagreeing with some part of respondent's determination is not of itself equivalent to a finding that the determination was arbitrary. See *Bodoglau v. Commissioner*, 230 F. 2d 336 (C.A. 7, 1957), affirming 22 T.C. 912. If the rule were otherwise, we would find it necessary to invalidate, in toto, every determination with which we did not wholly agree. Such a view would emasculate the well established rules relating to the burden of proof and seriously undermine the effect of the statutory notice upon which the principle of the burden of proof is founded in the usual situation.

Although we hold, *infra*, that respondent erred in failing to allow gambling losses to the extent of gambling gains, petitioner has not been prejudiced thereby because we have made such allowance (see discussion, *infra*). On the other hand, however, as will also appear *infra*, we think respondent was clearly right in disallowing the excess of gambling losses over gambling gains.

Petitioner next urges that respondent was arbitrary in treating deposits as gross income, but failing to allow any deductions or eliminations for "pay outs." Petitioner argues that respondent must have known that the very nature of petitioner's business was such that pay outs were necessary. As will appear *infra*, we have ma-

terially reduced respondent's determination. Again, however, this is not tantamount to a holding that the determination was arbitrary or invalid in whole or in part. Petitioner did not offer any substantiation of pay outs. He did not maintain any records from which pay outs could be calculated. The fact that his failure to do so was because of fear that they might be found by police authorities, and used in the prosecution of petitioner, and others operating illegal enterprises is hardly binding upon (or in any sense appealing to) respondent or to us. Inability to meet the burden of proof on the part of the petitioner does not shift the burden to respondent. It merely leaves petitioner with an unenforceable claim (*Burnet v. Houston*, supra, p. 1930) due, in this instance at least, to his own culpable failure to keep records.

With respect to respondent's failure to reduce deposits (treated as gross income) by any unsubstantiated amounts of pay outs, we need not repeat our reference to the authorities referred to supra dealing with the burden of proof except to recall that in *Doll v. Glenn*, supra, the Court referred to the fact that in the absence of books and records, the Commissioner was justified in treating the bank deposits as gross income "with the burden resting upon the taxpayer to show what amounts, if any, were nontaxable income, * * *." [Emphasis supplied.]

It should be noted, also, that respondent based his determination of increases in business income

solely on deposits and undeposited checks endorsed by petitioner (plus Film Row Club gains without offsetting losses). It is clear from the record, however, that petitioner received very substantial amounts in cash which he did not deposit. Respondent, however, did not include any of such cash in determining unreported business income.

Petitioner refers to the fact that respondent's determination was based in material respects upon third party records. This, of course, was necessary in part because petitioner, in his business of betting commissioner, maintained no records of commissions earned, bets placed, gross receipts or pay outs, and, in part, because petitioner's counsel refused to turn over to the investigating agent those records which were available. (We are not questioning the reason, wisdom or justification for this refusal. We consider only the fact that the records were not turned over.) The respondent, however, is not required to make his determination on the basis of evidence legally admissible in a formal proceeding in court. Moreover, and particularly where the taxpayer fails to keep proper records available for audit, respondent must be given latitude (short, of course, of arbitrary action on his part) in the use of such investigative techniques as the circumstances afford.

It is clear that where petitioner asserts the invalidity of a determination, the burden is on him to establish such invalidity. In this connection, in *Greenwood v. Commissioner*, 134 F. 2d 915 (C.A.

9, 1943), affirming this Court's decision in 46 B.T.A. 832, the Court of Appeals said (p. 919):

“Unquestionably the burden of proof is on the taxpayer to show that the Commissioner's determination is invalid.” (*Helvering v. Taylor*, 1935, 293 U.S. 507, 515 * * *), which burden is sustained by a clear showing that the determination was arbitrary or erroneous. * * *

Later (p. 922) the Court said:

Petitioner has failed to overcome the presumption of validity attaching to the determination of the Commissioner, * * *

On the basis of the foregoing discussion, we hold that respondent's determination was not arbitrary or invalid.

Understatements

It is well settled that the burden of proof rests with petitioner to establish error in respondent's determination of a deficiency. In *American Pipe and Steel Corporation v. Commissioner*, 243 F. 2d 125 (C.A. 9, 1957), affirming 25 T.C. 351, the Court of Appeals said:

Petitioner, having invoked the jurisdiction of the Tax Court, entered the hearing burdened with the duty of establishing by at least a preponderance of the evidence that the determination made by the Commissioner was erroneous. * * *

See also *Greenwood v. Commissioner*, *supra*.

We turn first to gains and losses from gambling at the Film Row Club. The amounts won and lost in 1948 and 1949 are set forth in our Findings. In each of the two years, the losses exceeded the gains. Respondent included the gains in gross income, but allowed no loss deductions. The information as to both gains and losses was furnished the investigating agent from records of the club and was received in evidence without objection. The agent frankly admitted that there was just as much reason to accept the record of losses as the record of gains. He appeared to have no doubt that both were correct, and made no suggestion that petitioner was in any way connected with, or had any interest in the club. The agent's real reason for disallowance of losses was that petitioner was on a cash basis, and the agent did not have information as to the year in which the losses were paid. We think, however, that we are justified in inferring that, to the extent the losses equalled the gains, the one was offset against the other and that separate payment of the losses was to that extent unnecessary. Accordingly, we allow the losses to the extent of the gains in 1948 and 1949. (The issue does not arise with respect to 1950.) We agree with respondent, however, in his refusal to allow any deduction for the excess of losses over gains. Here there is neither evidence of payment nor the year of payment. We hold, therefore, that deduction of the excess of losses over gains is not allowable.

On the question of petitioner's understatements of income as betting commissioner, we face a diffi-

cult task. We have no doubt from the record that the understatements for each year involved are quite substantial. It is, of course, impossible to determine such understatements with anything like accuracy or precision from this record. While the burden of proof is on petitioner, and the impossibility of accurate determination is engendered by petitioner's failure to maintain essential records for this phase of his business, we must deal with him as fairly as the circumstances which he has created will permit, and in spite of the fact that the fault is his. We recognize that, as betting commissioner, petitioner must have had substantial pay outs, but again we have no basis for calculating the amount thereof. At the same time, if we were merely to sustain respondent's determination, we think the result would obviously be harsh and unrealistic. We think our only proper course is to approach the problem indirectly by analysis of the record in the light of the principles established in *Cohan v. Commissioner*, 39 F. 2d 540 (C.A. 2, 1930). Our objective will be, after resolving any reasonable doubts against petitioner, to reconstruct his gross income as betting commissioner at a figure which in our judgment it would be unlikely to exceed in fact. (Petitioner, it is clear, has failed to establish a lesser amount.)

In *Roberts v. Commissioner*, 176 F. 2d 221 (C.A. 9, 1949), affirming 10 T.C. 581 (1948), the Court of Appeals said (p. 226):

The petitioner had kept no books. So the Tax Court had to determine the amount from such evidence as was presented to them. If the result is an approximation, the lack of exactitude is traceable to the petitioner's own failure to keep accurate account. As said by the Court of Appeals for the Second Circuit:

“Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making.” *Cohan v. Commissioner*, 1930, 39 F. 2d 540, 543, 544. * * * [Emphasis supplied.]

In the instant case, we make no pretense at precision. We merely do our best to circumscribe the results within practical limits by the exercise of our judgment within the scope of the principles announced in *Roberts*, *supra*, and *Cohan*, *supra*.

The figures of gross income at which we arrive *infra* are substantially less than those determined by respondent. Respondent does not question petitioner's deductions.

In the year 1948, petitioner's deposits in his commercial account totalled over \$500,000. Of this amount, the cash deposits were only a little over \$400. It is clear that the remaining deposits largely represented remittances from out-of-town betting commissioners with whom petitioner “laid off” bets when he could not find local bettors to take the op-

posite side of bets which were offered to him. It must be remembered that petitioner rarely acted as bookmaker (and then only of necessity) so that when one of his customers desired to place a bet, it was necessary for him to procure a customer betting the other way, or lay off the bet with another betting commissioner. We must also remember that the bets placed locally (representing a substantial part of his business) were largely cash transactions, while the bets laid off with out-of-town betting commissioners were largely settled for by check or money order. Petitioner's deposits, therefore, were largely representative of the settlement of bets laid off with out-of-town commissioners, or the settlement of bets which they laid off with him. The credit balance could be in either direction, and took into consideration wins, losses, and commissions.

These deposits, however, obviously did not represent all of the bets laid off. They represented not the result of an individual bet, but a settlement of accounts which usually represented the net result from the placing of more than a single bet. Moreover, in 1948, petitioner received checks in excess of \$120,000 which he either cashed or endorsed to others. These checks likewise represented net figures in the settlement of accounts involving a number of bets rather than a single bet.

In addition, petitioner issued substantial checks, largely to out-of-town betting commissioners, representing the settlement of accounts where the net

credits were in their favor. The amount of such checks for 1948 is not in the record, but the total of such checks in 1950 exceeded \$290,000 and it appears from petitioner's proposed Finding No. 50 and respondent's proposed Finding No. 83 that both parties are satisfied that the same general pattern of payments by check existed in 1948 and 1949.

The total of checks deposited, checks cashed or endorsed, and checks issued represents a minimum of layoff bets, because, as already indicated, they represented settlement of accounts arising out of more than one bet. The total of layoff bets, therefore, must have materially exceeded such total.

Before turning to local bets, we note at this point that in laying off bets with other betting commissioners, petitioner normally received only one-half of the commissions. Sometimes he received none at all, but he cannot estimate how often this occurred. Moreover, we note that the normal commission (before splitting) was 5 per cent on events other than horse races, while in horse racing, although the normal commission was likewise 5 per cent, only the loser paid a commission. Petitioner was unable to estimate what proportion of the bets were on horse racing.

So far, however, we have discussed only layoff bets with out-of-town betting commissioners. Since such layoffs, when placed by petitioner, only occurred when he already had bets, but had not found a customer betting the other way to balance off his

risk, it is clear that he must have placed local bets (handled largely in cash) in totals at least as large as the total of layoff bets. (When out-of-town betting commissioners laid off bets with him, he conversely placed balancing bets with his own customers or other commissioners.) On the bets placed with his own customers, there was no splitting of commissions.

Even the above-described practices do not paint the full picture. A substantial part of his business was the placing of bets locally. Petitioner could not estimate the proportions of local to out-of-town business. Except in instances such as those described above, where he couldn't place balancing bets with his own customers, and laid them off with other commissions, he accepted bets from local customers and offset them substantially by placing balancing bets with other local customers who were willing to risk their money by betting the opposite way. Here, he received full commissions of 5 per cent from both parties (except that in horse race bets only the loser paid commissioners) and did not split them with anyone else. It is clear from the record that this was a large part of his business.

Occasionally, he was unable to collect from a loser, but this seldom happened, because, as he testified, he watched his credits closely.

We have given painstaking care to the foregoing. We fully realize that much is lacking. We have

reconciled and integrated the elements as best we can by the use of our own judgment. We conclude, with respect to 1948, that it is not likely that petitioner received gross commissions as betting commissioner in excess of \$167,000, and that petitioner has failed to establish a lesser amount. From this, we subtract the gross income of \$56,795.13 of the Kingston Club reported by petitioner in his income tax return, and we find a net understatement of income as betting commissioner for 1948 in the amount of \$110,204.87.

Other items of income (including the small item of omitted interest) and deductions claimed by petitioner on his return are not in dispute.

Again we recognize that our finding of petitioner's net understatement of gross commissions as betting commissioner represents merely such an approximation as we may glean from the vague and meager record before us. To the extent that our approximation approaches accuracy, however, it necessarily gives indirect effect to the allowance of pay outs.

What we have said with respect to income as betting commissioner in 1948 applies in substance to 1949 as well, and we need not repeat our discussion in full. In 1949, the deposits in petitioner's commercial account totaled over \$400,000. Of this amount, the cash deposits were only a little over \$8,400. The remaining deposits were largely remittances from out-of-town betting commissioners. Un-

deposited checks which were either cashed or endorsed to others totaled over \$107,000. Again, it appears that substantial checks were issued by petitioner, largely to other betting commissioners, in settlement of accounts where the net credits were in their favor. The amount of such checks is not established for 1949 but (as stated above with respect to 1948) the total checks in 1950 exceeded \$290,000 and both parties appear satisfied that the same general pattern of payments by check existed in 1949. Here also the total of checks deposited, checks cashed or endorsed, and checks issued pictures a minimum of layoff bets since they represent in the main settlement of accounts arising out of more than one bet. Once more it is apparent that the total of the layoff bets must have materially exceeded such total. With respect to local bets, what we have said in relation to 1948 applies equally to 1949.

From all of the foregoing, we have concluded that it is not likely that petitioner received gross commissions in 1949 in excess of \$145,000 and that petitioner has failed to establish a lesser amount. Subtracting gross income of \$66,274.91 of the Kingston Club reported by petitioner in his income tax return, we find a net understatement of income as betting commissioner for 1949 in the amount of \$78,725.09. What we have said concerning other income and expenses and also, with respect to indirect allowance of pay outs for 1948, applies to 1949 as well

The picture does not change in principle in 1950, and we need not repeat our earlier discussion. Deposits in petitioner's commercial bank account totaled over \$283,000, of which about \$13,950 was deposited in cash. Undeposited checks which were either cashed or endorsed to others totaled \$22,613.75. Checks largely issued to other betting commissioners totaled in excess of \$290,000. Again there was a settlement of accounts, so that the total lay-off bets must have exceeded the total of checks deposited, checks cashed or endorsed, and checks issued to betting commissioners. What we have said about local bets again applies to 1950.

As to 1950, we have concluded that it is not likely that petitioner received gross commissions in excess of \$108,000 and that petitioner has failed to establish a lesser amount. Subtracting therefrom gross income from business in the amount of \$8,207.71 reported by petitioner in his amended income tax return for 1950, we find a net understatement of income as betting commissioner for 1950 in the amount of \$99,792.29. What we have said with respect to other income and expenses, and indirect allowance of pay outs for 1948 and 1949 applies also to 1950.

The gross income and understatements determined by us with respect to petitioner's activities as betting commissioner for each of the years in question include any income or loss from the Kingston Club card room. No separate income or loss

from the card room operation has been reliably established.

Petitioner's counsel argue on brief that petitioner, as a well known betting commissioner, was in a sense a trustee for the betting public, that his character is unblemished, his veracity not open to question and that his credibility is in no sense affected by the fact that he was engaged in an illegal business. It is argued, therefore, that we should accept his testimony that his returns as prepared for him by his accountant, were true, correct and honest, leading to the conclusion that we should find no deficiencies. We see no occasion to discuss the validity of the tradition of the honest gambler or whether, if valid, it extends to reporting of income for tax purposes. As will appear from our discussion *infra*, we think it is clear from the record that petitioner had substantial income in each of the years in question in excess of what he reported, and that he was well aware of it.

The data for petitioner's income tax returns for the years in question was prepared by the accountant Murton or under his direction by someone in his organization. The information, when assembled, was turned over to the accountant Calegari, who prepared the returns. The method of determining net income was described by the witness Evje (an accountant in Murton's organization) as follows:

The method used to arrive at what we will say is net income was to take—we had already itemized all deductible expenses. We take the

beginning bank balance and subtract it from the ending bank balance, adding to that any personal withdrawals, all of these expenses as itemized, and the difference between the beginning and the ending were these adjustments which would constitute gross income. From this would be deducted this summary as submitted in evidence here to arrive at net income from the operations of the Kingston Club.

Petitioner testified that he maintained a cash revolving fund of about \$3,000. He stated that if the amount in the fund was depleted, he added cash. If it increased to an amount substantially over \$3,000, petitioner testified that the excess was deposited in his commercial bank account. Murton completely disregarded cash on the theory that the revolving fund was kept at approximately \$3,000 and that any excess cash was deposited in the bank, and, therefore, reflected in Murton's calculation. Petitioner never furnished to Murton any information as to the amount of cash bets placed, cash receipts, cash disbursements, or cash commissions.

It is clear from the record that a large part of petitioner's business was local, and that, in the main, the local transactions were settled in cash. The commissions on such local business were likewise received in cash or deducted from cash payments when settlements were made. There is no specific evidence in the record as to the amount of local bets placed by petitioner, but we think a con-

servative estimate may be inferred from correlation with the amount of bets laid off with out-of-town betting commissioners. Bets were laid off with out-of-town commissioners largely when petitioner could not cover them locally. The transactions with out-of-town betting commissioners were largely by check or money order. Petitioner received or paid checks depending upon whether the net credit was in the hands of the out-of-town betting commissioner or in his own hands. The checks or money orders were largely in settlement of accounts, and represented the net from total bets in excess of the amounts actually remitted. The record contains evidence of petitioner's total deposits, cash deposits, undeposited checks and checks issued by him to bettors. (The figure for checks issued is available only for 1950, but both parties suggest in their proposed findings that the same pattern existed in 1948 and 1949, in each of which years the deposits and undeposited checks exceeded those in 1950.) We think the foregoing furnishes a basis for an estimate or approximation of total out-of-town bets. As a corollary, it furnishes a basis for approximating local bets. Out-of-town bets were largely layoffs, which presupposes local bets of relatively the same total. Moreover, there were substantial local bets which were laid off locally, either with in-town customers or betting commissioners in the area.

Keeping the above factors in mind, we think the record supports the inference (after due consid-

eration of the variations in commissions which we have already discussed) that petitioner received commissions from local bets in amounts not less than the following: 1948, \$69,000; 1949, \$60,000; 1950, \$44,000. Nevertheless, despite the fact that local bets were largely settled in cash, the total cash deposits in petitioner's commercial bank account for the entire three years were less than \$25,000, the amounts per year being approximately as follows: 1948, \$430; 1949, \$8,470; 1950, \$13,955. We think it apparent upon consideration of all of the circumstances that large amounts of cash commissions in each of the years in question were not deposited in the bank and could not have been reflected in Murton's figures which disregarded cash or in petitioner's income tax returns based on Murton's data.

It is no answer to suggest that all cash receipts (including cash commissions) were used for pay outs. Petitioner himself testified that he broke about even as a result of the few occasions on which he acted as bookmaker. He testified that the occasions on which he failed to collect from losers were likewise few (except for losses totaling about \$25,000 from failure to collect from two losing bettors in 1950) because he watched his credits closely. Except under these two circumstances, he did not shoulder the risk of the bet. His method of doing business necessarily resulted in an excess of total receipts over total pay outs, and the volume of his business, inferable from the record, and the

rate of commissions (allowing for the variations which we have already recognized) were such that his total commissions for each year involved greatly exceeded those reported. Since the total commissions were obviously not reflected in his commercial bank account, the inference is clear that they were received and retained in cash. It is to be recalled also that in each of the years in question, petitioner "received and endorsed" a substantial total of checks which he did not deposit.

Calegari's "Report on Lesly Cohen, January 1, 1948, to December 31, 1950," has the same defect as Murton's figures. Calegari, too, totally disregarded cash, in order to be consistent, (as he testified) with Murton. Calegari's calculation of net income is substantially based upon the same principles as those applied by Murton, except that Calegari eliminated from deductions certain personal expenditures which Murton had not found. Calegari's net worth statement likewise disregards the factor of cash on hand as of the beginning and ending of the net worth periods. By the same token, because the facts were not presented to him, he did not and could not take into consideration annual increases in cash attributable to cash commissions. See *Miller v. Commissioner*, 237 F. 2d 830 (C.A. 5, 1956), affirming in part a Memorandum Opinion of this Court.

However well intentioned, it is obvious that the calculations of Murton and Calegari do not establish petitioner's actual income as betting commis-

sioner for any of the years in question, and are in no sense an answer to the conclusion we have reached supra that petitioner received substantial commissions in each of the years in question which were not reported in his income tax returns.

Much is made of the fact that a prior examination made by Revenue Agent Parenti did not develop any substantial omissions of income. We think this to be of no significance. Parenti was making a routine examination and relied upon records from Murton's office. Murton himself was unaware of the income from cash commissions. Parenti's examination and report were in no sense binding on respondent.

Fraud

We next consider the question of whether or not a part of the deficiency for each of the years 1948, 1949 and 1950 was due to fraud with intent to evade tax within the meaning of section 293(b). The burden of proof with respect to fraud is upon the respondent, and he must establish fraud on the part of petitioner by clear and convincing evidence. *Arlette Coat Co.*, 14 T.C. 751 (1950).

It should be noted at the outset that our conclusions in these respects must be based upon consideration of the entire record properly before us, and that we are not limited to a consideration of respondent's affirmative evidence. *Frank Imburgia*, 22 T.C. 1002 (1954); *Wallace H. Pettit*, 10 T.C. 1253 (1948); *L. Schepp Co.*, 25 B.T.A. 419 (1932).

We also recognize that in this, as in many fraud cases, the proof of fraud, if it is to be established, must depend in some respects upon circumstantial evidence. Fraudulent intent can seldom be established by a single act or by direct proof of the taxpayer's intention. It is usually found by surveying his whole course of conduct and is to be aduced as any other fact from all the evidence of record and inferences properly to be drawn therefrom. *M. Rea Gano*, 19 B.T.A. 518 (1930).

Our finding of an understatement in taxable income for each of the years for the purposes of the deficiencies involved was based in some respects upon petitioner's failure to meet his burden of proof. We recognize that respondent cannot meet his own burden of establishing fraud on the basis of petitioner's failure to discharge the burden of proving error in the determination of deficiencies, and we do not, of course, rest our finding of fraud on that basis. The existence of fraud with intent to evade tax must be affirmatively established by respondent. *Kurnick v. Commissioner*, 232 F. 2d 678 (C. A. 6, 1956); *Drieborg v. Commissioner*, 225 F. 2d 216 (C.A. 6, 1955), affirming in part a Memorandum Opinion of this Court.

After a painstaking analysis of all of the evidence in this case, and bearing in mind the above-stated principles, we are convinced that petitioner received taxable income during each of the years 1948, 1949 and 1950 from his activities as betting commissioner in excess of that reported on his re-

turns for those years, and that in each of said years a part of the deficiency was due to fraud with intent to evade taxes. It is well settled that respondent, in sustaining his burden of proof of fraud, need not prove the precise amount of the deficiency attributable to such fraud, but only that a part of the deficiency is attributable thereto. *United States v. Chapman*, 168 F. 2d 997 (C.A. 7, 1948), certiorari denied 335 U.S. 853.

Taking into consideration the minimum volume of layoff bets indicated by the deposit of checks and money orders from out-of-town betting commissioners; undeposited checks and money orders from the same sources; checks of petitioner to betting commissioners; the fact that the remittances to and from petitioner usually represented the settling of accounts rather than individual bets; the added fact that petitioner's local cash business was a substantial part of his betting commissioner activities, recognizing the percentages he received (and making allowance for splitting of commissions on out-of-town business, occasional foregoing of commissions, occasional losses, and the fact that petitioner received commissions on horse race bets only from the loser), we reach the conclusion that there was a substantial understatement of income on petitioner's return for each of the taxable years in question. We cannot, on the record before us, determine the precise amount of such understatements, and we are not required to do so. However, after resolving any doubts in this

respect against respondent, with whom the burden of proof of fraud lies, we hold, upon our analysis of the record, that the understatements were substantial for each year before us. Our analysis likewise convinces us that a large part of the understatements in each of said years was attributable to petitioner's failure to include in his return the receipt of commissions in cash.

In the light of the foregoing, we, of course, reject petitioner's testimony to the effect that his returns were honest, correct and complete because analysis of the record demonstrates the contrary. The testimony of his accountants does not lead to a different view. They being uninformed of the full facts relating to cash transactions, could not reflect income undisclosed to them in preparing his returns.

Consistent understatement of income in substantial proportions is in itself persuasive evidence of fraudulent intent to evade taxes. *Rogers v. Commissioner*, 111 F. 2d 987 (C.A. 6, 1940), affirming 38 B.T.A. 16; *Drieborg v. Commissioner*, *supra*; *Bryan v. Commissioner*, 209 F. 2d 822, 828 (C.A. 5, 1954), certiorari denied 348 U.S. 912. Here, in addition, petitioner failed to maintain records of his cash transactions, or of the cash commissions earned in such transactions, and kept uninformed the accountants whom he employed to prepare the data for his returns and the returns themselves. Petitioner admits that his failure to maintain rec-

ords of his transactions as betting commissioner was deliberate. The reason he assigns was to keep them from law enforcement officers on the lookout for illegal gambling activities. We have no doubt that concealment from the tax authorities and evasion of taxes was a co-ordinate objective. If this were not so, he could readily have kept sufficient records to supply his accountants with information as to his earnings so that his income tax returns would have reflected his true income even though such records did not include the names of his customers and the other betting commissioners with whom he dealt. Petitioner was an educated man and could not have been unaware of his obligations as a taxpayer. We need not labor the question of whether or not Murton told petitioner that the internal revenue officer in San Francisco had advised him by letter that his accounting method was adequate for income tax purposes. Assuming that a responsible revenue official would write such a letter (which we doubt), there is nothing in the evidence to the effect that the tax authorities or Murton ever advised petitioner that it was not necessary for him to disclose to Murton the full amount of his commissions, or report them in his income tax returns.

We think it clear, without going into further detail, that fraudulent intent to evade taxes must be inferred from petitioner's conduct as disclosed by the record. The Supreme Court had occasion to consider the problem of inference of fraud from

conduct in *Spies v. United States*, 317 U.S. 492 (1943), and said, in this connection (p. 499):

By way of illustration, and not by way of limitation, we would think affirmative wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime. [Emphasis supplied.]

Upon the entire record, therefore, we hold that respondent has met his burden of proving that there was a deficiency for each year in question due at least in part to fraud with intent to evade tax, and that additions to tax under section 293(b) are to be applied for each of said years.

Decision will be entered under Rule 50.

Filed: September 12, 1957.

Entered: September 12, 1957.

Served: September 12, 1957.

Tax Court of the United States
Washington

Docket No. 46719

LESLY COHEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Memorandum Findings of Fact and Opinion filed September 12, 1957, having filed an agreed computation of the tax, it is

Ordered and Decided: That there are deficiencies in income tax and additions to tax as follows:

Years	Deficiency	Additions to Tax Under Section 293(b), I.R.C., 1939
1948	\$72,164.36	\$38,835.02
1949	\$47,364.77	\$27,790.00
1950	\$49,004.79	\$24,502.40

[Seal] /s/ MORTON P. FISHER,
 Judge.

Served: December 12, 1957.

Entered: December 12, 1957.

United States Court of Appeals,
Ninth Circuit

Tax Court Docket No. 46719

LESLY COHEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Review of Decision of the Tax Court
of the United States by the United States
Court of Appeals for the Ninth Circuit

To: The Honorable, the Judges of the United
States Court of Appeals for the Ninth Cir-
cuit:

I. Jurisdiction:

On the 9th day of December, 1957, the Tax Court of the United States entered its decision in this case, Tax Court Docket No. 46719, setting up deficiencies of income tax against the petitioner Lesly Cohen for the year 1948 in the sum of \$72,-164.36 with additions to tax under Section 293(b) IRC 1939 in the sum of \$38,835.02, and for the year 1949 it set up a deficiency in income tax of \$47,-364.77 with additions in tax under Section 293(b) IRC 1939 in the sum of \$27,790.00, and for the year 1950 it set up deficiency in income tax of \$49,-004.79 and additions to tax under Section 293(b) IRC 1939 in the sum of \$24,502.40.

The petitioner duly filed his income tax returns for the years involved with the Collector of Internal Revenue at San Francisco, California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, and during all the period involved was a resident of San Francisco, California, but is now a resident of Las Vegas, Nevada.

The jurisdiction of this Court to review the decision of the Tax Court of the United States, as aforesaid, is found in Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II. Nature of the Controversy:

The nature of the controversy before the Tax Court of the United States is the determination of the income taxes of the petitioner for the calendar years 1948, 1949 and 1950 together with additions to the tax under Section 293(b) of the Internal Revenue Code 1939 and, in particular, (a) whether the respondent's use of the bank deposit method was justified, (b) whether certain losses incurred in taxpayer's dealings as a betting commissioner with the Film Row Club were deductible in full, (c) whether, and to what extent, petitioner omitted taxable income from his returns for each of the years 1948, 1949 and 1950; and (d) whether if there was any additional income for each of the years in question, any part of the deficiency was due to fraud.

1. Petitioner is an individual whose business office during the years in question was located at San Francisco, California. Petitioner was on the cash basis of accounting and filed his income tax returns for the years 1948, 1949 and 1950, respectively, with the Collector of Internal Revenue for the First District of California at San Francisco, California.

2. Throughout the years in question the petitioner operated a cardroom and betting commissioner business. The operations of the cardroom were not in controversy in this case. The commission petitioner received on the bets handled for his own customers was 5% on each bet handled by him, except that on horse racing bets only the loser paid a commission. These commissions were not split. On bets laid off with other betting commissioners, the commission was usually split, half going to petitioner. At times, he found it necessary to waive his entire commission in order to get the bets laid off with another betting commissioner.

3. The respondent's deficiency notice, dated November 25, 1952, proposed two additions to income for the year 1948. (a) "Interest \$159.12 which is stated to be interest received on a refund of Federal income tax which was not included in income as reported." This item was not at issue in the Tax Court, nor is it an issue here. (b) Business income \$693,189.62. For the year 1949 the only item in this statement is: "(a) Business income \$542,478.73." For the year 1950 the statement includes the fol-

lowing: "(a) Business income \$326,095.00." The Revenue Agent testified that the sums designated in the deficiency letter as additional business income were made up from three sources:

(a) The total bank deposits included both cash and checks;

(b) The sum of a considerable number of checks which had been cashed by petitioner or endorsed by him to other parties instead of deposited in the bank account;

(c) He added to the above sums the wins from the Film Row Club;

(d) He did not allow any of the losses shown on the books of the Film Row Club from which he took the winnings.

There is no evidence in the record that would indicate the Film Row Club transactions were personal bets of the petitioner.

4. The petitioner's accountant died in the year 1950 and petitioner was unable to locate his checks and bank statements. However, Mr. Parenti, a Revenue Agent, had previously checked and audited the petitioner for the years 1948 and 1949 and all the petitioner's bank statements and canceled checks were available to Mr. Parenti at the time. Mr. Parenti issued a Revenue Agent's Report which shows several adjustments to petitioner's income tax return, but at no time did he question the adequacy of the method of accounting employed by Mr. Merton, petitioner's accountant.

III. Assignment of Errors:

In making its decision, as aforesaid, the Tax Court of the United States committed the following errors upon which your petitioner relies as a basis of this proceeding:

1. The Tax Court erred in holding that any deficiency exists with respect to petitioner's personal income tax for the taxable years ended December 31, 1948, December 31, 1949 and/or December 31, 1950, except a small deficiency for interest received on an income tax refund in the sum of \$159.12 in the year 1948. There is no evidence in the record to sustain the findings of the Tax Court that petitioner understated his income for the years involved.

2. The Tax Court erred in holding that any part of the deficiency for each of the years in question was due to fraud with intent to evade taxes.

3. The Tax Court erred in refusing to follow the determination of Revenue Agent Parenti in his audit for the years 1948 and 1949 when the Revenue Agent had available all the checks, bank accounts and records of the petitioner.

4. The Tax Court erred in refusing to hold that the determination of the deficiencies for each of the years was arbitrary, illegal and void in view of the fact that the petitioner proved his net worth statement and the respondent introduced no evidence showing that there was error in the net worth

statement presented to it, and there was no evidence to support the deficiency letter's findings and no contradiction of the taxpayer's evidence that he reported all his income.

5. The Tax Court erred in not allowing the full losses of the Commissioner's activities as a betting commissioner in the Film Row matter.

6. The Tax Court erred in refusing to accept the long established method of accounting used by the taxpayer's accountant when it had been audited not only by the agent Parenti, but by previous Internal Revenue auditors and no objection had been made to the taxpayer of his method of accounting.

Wherefore, your petitioner prays that this Honorable Court may review the decision and order of the Tax Court of the United States in this cause and reverse and set aside the same, and to direct the Tax Court to determine and enter an order on such determinations there is no deficiency in the payment of income tax for the taxable year ended December 31, 1948, except on the basis that there should be an addition to income and the deficiency determined on the sum of \$159.12 of interest unreported; that there is no deficiency in the payment of income tax for the taxable year ended December 31, 1949; that there is no deficiency in payment of income tax for the taxable year ended December 31, 1950; that there is no evidence to support the Tax Court's finding of an intent to evade or defraud the revenues of the United States: and for

the entry of said other decisions and orders, and such other and further relief as shall appear proper in the premises.

Dated: March 3, 1958.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Petitioner.

Received and filed March 4, 1958, T.C.U.S.

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

Nelson P. Rose, Attorney for Respondent,
Chief Counsel, Bureau of Internal Revenue,
Internal Revenue Building, Washington, D. C.

You Are Hereby Notified that on the 4th day of March, 1958, a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause, was filed with the Clerk of the Court. A copy of the petition as filed is attached hereto and served upon you.

Dated: March 6th, 1958.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Petitioner.

Service of copy acknowledged.

Received and Filed March 10, 1958, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is stipulated that the following facts may be received in evidence without further proof; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated; and provided, further, that both parties to this stipulation reserve the right to object to the materiality and relevancy of any of the facts herein stipulated.

1. The petitioner is and was throughout the years in controversy herein a single individual. The returns for the periods here involved were filed with the Collector for the First Collection District of California.

2. For each of the taxable years involved, petitioner filed his income tax return on the calendar year and cash basis. Attached hereto and marked with the exhibit numbers as indicated are copies of

the income tax returns filed by the petitioner for said years:

Ex. 1-A—1948 return.

Ex. 2-B—1949 return.

Ex. 3-C—1950 return.

Ex. 4-D—1950 amended return, filed July 28, 1954.

3. During the years 1948, 1949 and 1950 petitioner owned and operated as sole proprietor an establishment known as the Kingston Club, which said Kingston Club was located at 111 Ellis Street, San Francisco, California.

4. Throughout the years 1948, 1949, and 1950, the petitioner maintained a commercial account in the name of "Les Cohen" at the Market-Ellis branch of the Anglo-California National Bank, San Francisco, California. Attached here to and marked Exhibit 5-E is a summary of the deposits to said account during said years prepared from the deposit slips on file with the bank, except for the month of November, 1949, for which no deposit slips could be located. The first column on said summary shows the date of the deposit, the second column shows the number of items that made up the deposit; the third column shows the amount of cash, if any, included in said deposit, and each pair of columns thereafter shows the bank reference number and the amount of each check deposited.

5. The total deposits to petitioner's commercial account in the Market-Ellis branch of the Anglo-

California National Bank for each of the years 1948, 1949, and 1950, were in the following amounts:

1948.....	\$508,384.23
1949.....	\$404,118.69
1950.....	\$283,129.80

Deposits totalling \$2,905.00 were made to said account on January 3, 1951.

6. During the years in controversy the petitioner received and endorsed checks issued to "Les Cohen" by "The Horse Shoe," 1047 Third Avenue, Seattle, Washington. Attached here to and marked Exhibit F is a list showing said checks.

7. During the years in controversy the petitioner received and endorsed checks issued to "Les Cohen" by "Nationwide Sport Service," 314 South Broadway, Portland, Oregon. Attached hereto and marked Exhibit G is a list of said checks.

8. During the years in controversy the petitioner received and endorsed checks issued to "Les Cohen" drawn on the United States National Bank of Portland and signed "A.A.F.F. Account by Geo. Storey." Attached hereto and marked Exhibit H is a list of said checks.

9. During the years 1948 and 1949 the petitioner endorsed checks drawn on the National Safety Bank and Trust Company of New York and issued by Abraham Abrams. Attached hereto and marked Exhibit I is a list showing said checks.

10. Because of revision there is no Exhibit J.

11. During the years 1948 and 1949 the petitioner received and endorsed checks drawn on the Bank of America, San Diego, California, and issued by Herman Hetzel. Attached hereto and marked Exhibit K is a list of said checks.

12. During the year 1948 the petitioner received and endorsed two checks drawn on the Bank of America, Beverly-Vernon branch, Los Angeles, issued by Clyde Baxter. Said checks were dated February 24, 1948, and May 3, 1948, and were in the amounts of \$4,391.25 and \$8,415.00, respectively.

13. During the years in controversy the petitioner received and endorsed checks drawn on the Mississippi Valley Trust Co., St. Louis, Missouri, and issued by M. L. Cooper & Co. Attached hereto and marked Exhibit L is a list of said checks.

14. During the years in controversy the petitioner received and endorsed checks drawn on the First National Bank of Chicago, Chicago, Illinois, issued by Edward M. Dobkin & Co. Attached hereto and marked Exhibit M is a list of said checks.

15. During the years 1948 and 1949 the petitioner received and endorsed checks drawn on the Bank of America, South Hollywood branch, Los Angeles, California, issued by Hymie Miller. Attached hereto and marked Exhibit N is a list of said checks.

16. During the year 1948 the petitioner received and endorsed checks drawn on the Stockton Savings & Loan Bank, Stockton, California, issued

by Raymond E. Kelliher. Attached hereto and marked Exhibit O is a list of said checks.

17. During the years 1948 and 1949 the petitioner received and endorsed checks drawn on The LaSalle National Bank, Chicago, Illinois, issued by Mal Clarke & Co. Attached hereto and marked Exhibit P is a list of said checks.

18. During the years in controversy the petitioner received and endorsed checks drawn on The First National Bank of Portland, Oregon, issued by Irving J. Hasson. Attached hereto and marked Exhibit Q is a list of said checks.

19. The petitioner received payments in the amounts of \$55.00 and \$2,475.00 by bank drafts dated June 1, 1948, and August 30, 1948, respectively, from Barrick, Weyerman, and Ziegman, doing business as "Baseball Headquarters," Omaha, Nebraska.

20. During the years 1948 and 1949 the petitioner received and endorsed checks issued by Lee Jones, Jr., of San Francisco, California. Said checks were dated and in amounts as follows:

January 13, 1948.....	\$1,000.00
May 17, 1949.....	\$500.00
June 27, 1949.....	\$335.00
August 31, 1949.....	\$116.00

21. Attached hereto and marked Exhibit R is a schedule showing, by years, the total amounts of the checks referred to in paragraphs 6 through 20,

supra, and showing in a column headed "Deposited" the total amounts of said checks which were deposited in petitioner's commercial account at the Market-Ellis branch of the Anglo-California National Bank, San Francisco, California, and showing in a column headed "Not Deposited" the total amounts of said checks which were not so deposited.

/s/ JOHN V. LEWIS,
Counsel for Petitioner.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Filed March 28, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

DOCKET ENTRIES

1953

- Feb. 2—Petition received and filed. Taxpayer notified. Fee paid.
- Feb. 3—Copy of petition served on General Counsel.
- Mar. 31—Answer filed by General Counsel.
- Mar. 31—Request for hearing in San Francisco, Calif., filed by General Counsel.
- Apr. 6—Notice issued placing proceeding on San Francisco, Calif., calendar. Service of Answer and Request made.

1953

May 12—Reply to Answer filed by taxpayer. Copy served 5/13/53.

1955

Dec. 21—Hearing set Mar. 26, 1956 — San Francisco, Calif.

Dec. 22—Revised notice as to spelling of Petitioner's last name, filed.

1956

Mar. 28—Hearing had before Judge Fisher on the merits, Stipulation of Facts, filed at hearing, Petitioner's Brief due 5/28/56; Respondent's Brief due 7/27/56; Petitioner's Reply due 8/27/56.

Apr. 5—Transcript of Hearing 3/28/56 filed.

May 25—Petitioner's Brief filed. 5/28/56 served.

July 27—Respondent's Brief filed. 7/30/56 served.

Aug. 16—Motion for extension of time to 9/27/56 to file reply brief, filed by Petitioner. 8/16/56 —Granted.

Sept. 27—Petitioner's Reply Brief, filed. 9/27/56 served.

Oct. 16—Motion for leave to file memorandum, memorandum concerning new matter in Petitioner's reply brief lodged, filed by Respondent.

Oct. 18—Motion for leave to file memorandum Granted, memorandum concerning new matter in petitioner's reply brief, filed by Respondent. Served 10/22/56.

1957

- Sept. 12—Memorandum sur order in re motion to strike evidence, filed.
- Sept. 12—Memorandum findings of fact and opinion rendered, Judge Fisher. Decision will be entered under Rule 50. Served 9/12/57.
- Nov. 20—Respondent's computation filed.
- Nov. 25—Notice of hearing Feb. 5, 1956, Wash., D. C. Served 11/26/57.
- Dec. 3—Agreed computation filed.
- Dec. 9—Decision entered, Judge Fisher. Served 12/12/57.

1958

- Mar. 4—Petition for Review by U. S. Court of Appeals, 9th Circuit, filed by petitioner.
- Mar. 10—Notice of filing petition for review with proof of service thereon filed.
- Mar. 10—Designation of the portions of record, proceedings and evidence to be contained in the record on appeal with proof of service thereon, filed.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers as called for by the "Designation of the Portions of

record, proceedings and evidence to be Contained in the Record on Appeal," excepting the exhibits which are separately certified, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 25th day of March, 1958.

[Seal] /s/ RALPH A. NORMAN,
 Chief Deputy Clerk, Tax
 Court of the United States.

[Endorsed]: No. 15982. United States Court of Appeals for the Ninth Circuit. Lesly Cohen, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: April 8, 1958.

Docketed: April 15, 1958.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

